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RAILROAD REPORTS

(Vol. 32 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME IX.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.

1904.

PUBLICATIONS
of
THE MICHIE COMPANY,
Charlottesville, Va.
Virginia Reports, Annotated.
American and English Railroad Cases, N. S.
American and English Corporation Cases, N. S.
Municipal Corporation Cases.
Banking Cases.

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RAILROAD REPORTS

CENTRAL OF GEORGIA RY. CO. *v.* JAMES.

(*Supreme Court of Georgia, June 27, 1903.*)

[45 S. E. Rep. 223.]

Carriage of Live Stock—Contract by Agent—Estoppel.

On the trial of an action sounding in tort, brought against a railway company with a view to recovering damages sustained by the plaintiff because of its failure to safely transport live stock which he in his petition alleges he delivered to it for shipment, it is competent for him to show that delivery to the carrier was made by him through an agent, notwithstanding such agent made the shipment in his own name as owner, without disclosing to the company the fact that he was acting for and in behalf of the plaintiff. It follows, however, that, as the plaintiff thus predicates his suit upon a breach of duty arising out of the contract made by his agent, the former is bound by its terms, irrespective of the question whether the agent was or was not authorized to enter into a contract of that character.

Same—Effect of Shipper's Agreement to Care for Stock.*

A shipper of live stock cannot justly complain that a carrier failed to give needful attention thereto while in transit, when, notwithstanding he agreed, in consideration of a reduced freight rate and free transportation for himself or agent, to take charge of and care for the animals during their journey, he did not himself accompany them, or procure another to do so.

Same—Evidence.

When, in an action such as the present one, the plaintiff does not allege that the carrier was negligent in not transporting his stock with due dispatch, proof that there was unusual delay in the transportation, and that the company was requested to hasten the shipment, is wholly irrelevant and inadmissible.

Same—Defective Car—Sufficiency of Evidence.

In view of the terms and stipulations of the special contract upon which the prevailing party in the trial court relied as furnishing a basis for his suit, the evidence offered in his behalf did not warrant a finding in his favor on the theory that the company was negligent in furnishing him with a car which was unsuitable and defective.

(Syllabus by the Court.)

Error from Superior Court, Early County; H. C. Sheffield, Judge.

Action by D. W. James against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. G. Powell and W. W. Bacon, Jr., for plaintiff in error.
R. H. Sheffield, for defendant in error.

SIMMONS, C. J. An action for damages was brought by D. W. James against the Central of Georgia Railway Company, the plaintiff alleging in his petition that on December 27, 1900, he delivered to the defendant carrier, in the city of Atlanta, a car load of mules to be shipped over its line to Blakely, Ga.; that, while the mules were in transit, one of

*See notes at end of case.

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them "kicked through the door of the car in which they were being so transported, and was unable to draw its foot back, and, although the foot of said mule was fully exposed to view to the servants and agents of said company passing by and around said car, the said mule remained in the condition aforesaid until the same was delivered to petitioner in Blakely," and within four days thereafter died from the injuries it received. The company was charged with negligence, in that it failed "to provide a car with a sound and suitable door, and one sufficiently thick and strong to have avoided injury by the stock to themselves," and also with neglect in not giving attention to the mule after it had so caught its foot and had fallen in a helpless condition upon the floor of the car. The company set up the defense that the car load of mules had been shipped at a reduced rate of freight under a special contract, by the terms of which it was absolved from all liability to account to the plaintiff for the value of the mule which had been injured in transit. He subsequently amended his petition by alleging that "the freight was not agreed upon nor paid until after the said mules had arrived in Blakely, the end of their destination." The case was tried upon the issue thus raised, the trial resulting in a verdict for the plaintiff. The company made a motion for a new trial, based on divers grounds, but its motion was overruled, and it excepted.

1. The plaintiff was permitted, over the objection of counsel for the company, to testify that the stock had been delivered to it in Atlanta by the proprietors of the Brady-Miller Feed & Sale Stables, under an arrangement whereby they were to act as his agents in making the shipment. The objection urged against this testimony was that the plaintiff, in his petition, alleged he had made the delivery to the company, whereas "the written contract of shipment, which had been produced in court by the plaintiff under notice, showed on its face that this stock was not delivered to [the defendant] by plaintiff, but by the Brady-Miller Feed & Sale Stables, of Atlanta, who signed the contract as owners without revealing that plaintiff was interested in the shipment except as consignee and person in charge of the stock." We think the testimony was properly admitted. The action sounded in tort, and it was permissible for the plaintiff to show that, by virtue of a contract of shipment made in his behalf by his authorized agents, the company owed him a duty, as a common carrier, to transport the stock to destination in accordance with its undertaking thus assumed. In other words, proof of this contract was competent for the purpose of showing that a relation existed between the plaintiff and the carrier which imposed upon it a legal duty, as to him, of properly performing its obligations in the premises. It is not essential, in order to create such a relation, that a shipper should in person deliver freight to a carrier, for the law deems

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the acts of an authorized agent as those of his principal. Thus, though a consignee be not a party to a contract of carriage between a railway company and a shipper, the consignee may nevertheless make proof of such contract, with a view to showing the company became liable to him for a failure to comply with its legal duty as a common carrier to perform such contract, the same having been made for his benefit. Of course, where the owner of goods does not attend to their shipment in person, but procures another to act in his behalf, who does so without disclosing the name of his principal, the latter is bound by the terms of the contract which his agent makes with the carrier to the same extent as though the contract was made by the principal in person, irrespective of the question whether the agent did or did not go outside of the authority with which he was vested. This is true for the all-sufficient reason that the principal cannot take advantage of the contract made in his behalf without fully ratifying the act of his agent, and becoming bound thereby.

On the argument here counsel for the plaintiff in error cited and relied on the case of *Atlanta & West Point R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600, as sustaining his contention that the testimony objected to was not, in view of the pleadings filed by James, admissible. In that case it appeared that the Texas Grate Company brought suit in the capacity of a consignee to recover damages alleged to have grown out of a failure by the railroad company to perform a contract of carriage entered into between it and the firm of Withers & Holland, whereby the company obligated itself to deliver certain freight to either the plaintiff, or to H. M. Beaty & Co. for the plaintiff. The evidence wholly failed to establish any contract whatsoever to deliver the freight to the Texas Grate Company, or to any one as its agent. Indeed, the proof showed that the undertaking of the carrier was "to deliver not only to, but for, H. M. Beaty & Co.," and that the shipper had not even intended to consign the shipment to the plaintiff. This being so, it was necessarily ruled that there was a fatal variance between the allegata and the probata. In the present case it cannot seriously be doubted that in legal contemplation, as well as in point of fact, the real shipper was James, the plaintiff, notwithstanding his agents, through whom he acted, did not disclose this fact to the carrier; and, as has already been remarked, it could in no way be prejudiced by a disclosure of what was the truth in this regard, since James must stand or fall upon the contract of shipment made in his behalf, which furnishes the basis of his action, although it sounds in tort. Had he brought suit on the contract, doubtless it would have been necessary to allege his relation thereto as a party, for otherwise his pleadings would indicate that he was attempting to

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sue for an alleged breach of a contract to which he was apparently a stranger.

The contract under which the stock was shipped was evidenced by a writing which purported to be signed not only by "The Brady-Miller F. & S. Stables, Owner or Shipper," but by D. W. James, as the person "actually in charge of the stock." The plaintiff testified he gave no one authority to sign his name to the contract, but admitted that he was furnished with either the original, or a copy of it, before he left Atlanta for Blakely, and accepted and used a pass which the company had issued in his name, agreeably to the terms of the writing, in order that he might take passage on the train transporting the mules, and take charge of and care for them during the journey. In this connection the trial judge charged the jury: "You will first see if there was any special contract of carriage between the parties, and whether Mr. James, the plaintiff, signed that contract, or authorized any one to do so for him. If he made no special contract, then the liability of defendant as common carrier would be the ordinary liability of such carriers, according to the rules I have given you in charge." This instruction to the jury was excepted to on the ground that as the proof showed affirmatively that the shipment was made under a special contract, the terms of which varied the common-law liability resting on carriers, the right of the plaintiff to recover depended entirely upon the legal effect of such contract, and whether or not the defendant had failed to comply with the obligations it thereby assumed. The point is well taken. That the agents of the plaintiff executed this writing was an admitted fact. Whether or not they had authority to sign his name thereto was wholly immaterial. Independently of this written contract of carriage, he had no dealings with the company, or any right to assert that he was the true owner and shipper of the stock, and, as such, the proper person to maintain against it an action for damages because of its alleged failure of duty as a carrier. If his agents acted beyond the scope of their authority in entering into this special contract, he must look to them for any loss sustained by reason of their breach of duty to him in not making in his behalf a contract with the company such as he authorized. He cannot rely on the contract actually made, without unreservedly ratifying the acts of his agents in entering into the same, and becoming bound by all its terms and stipulations, in so far as they have legal force and effect. We shall accordingly, in our further discussion of the case, deal with this contract as though he had made it in person, instead of through agents.

2. The evidence did not, in our opinion, warrant a finding that the trainmen might, had they used all proper diligence in looking after and caring for the plaintiff's stock, have prevented or lessened the injuries to the animal

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which caught its foot in the car door, by taking prompt measures to extricate it. But however this may be, the plaintiff was not in a position to assert that the company was under any duty to him to watch over and care for his stock while in transit. On the contrary, under the express terms of his special contract, the company was relieved of any such duty; the shipper agreeing, in consideration of the reduced freight rate, and the furnishing to him of a free passage for himself or agent, to either personally accompany the stock and look after the comfort and welfare of the animals, or to provide a servant to do so for him. He did neither, but took passage from Atlanta to his destination on a passenger train, thus assuming the risk of injury to his stock from lack of attention during the journey.

3. Over timely and proper objection interposed by the defendant's counsel, the court allowed the plaintiff to prove that the train on which his stock was shipped was delayed several hours in Arlington, an intermediate station between the point of shipment and Blakely, and did not arrive at the place last mentioned until after 7 o'clock in the evening, although due to arrive at that station between 1 and 3 o'clock p. m.; also that the plaintiff requested the agent at Arlington to wire the superintendent to have the car load of stock sent through to destination on a passenger train, and that the plaintiff himself sent a telegram to the company's superintendent, in which a request was made that this be done, on account of bad weather. As will have been noted, the plaintiff did not, in his petition, allege that the company was negligent in that it did not transport his stock with due dispatch, and that its failure to do so brought about or contributed to the injury of the mule, for the value of which he brought suit. A plaintiff is entitled to recover, if at all, only on proof of the case made by his pleadings. *Central Railroad v. Avant*, 80 Ga. 195, 5 S. E. 78.

4. The only remaining question with which it is necessary we should deal is whether or not the plaintiff sustained his contention that the carrier was liable because it failed "to provide a car with a sound and suitable door, and one sufficiently thick and strong to have avoided injury by the stock to themselves." The evidence disclosed that the car furnished by the company was of standard make, and in a perfectly sound condition. "The door to this car was of slats about $\frac{3}{4}$ of an inch thick and 4 or 5 inches wide. * * * The space between them was about $1\frac{1}{4}$ inches—possibly 2 inches. There was a piece across the door at the top, one in the center, and one at the bottom. The door was about six feet two or three inches high." There was "an indentation on one of the slats which looked like it might have been made by a horse kicking. The mule could not have gotten his foot through that high without great force. His foot was hung about 3 $\frac{1}{2}$ or 4 feet in the door above the floor." None of the slats

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were broken. They were not "very elastic," though those between which the mule's foot was hung had evidently sufficiently "sprung" to admit the passage of the animal's hoof. The space between these slats was, by actual measurement with a rule made after the mule had forced his foot through the opening, "1½ inches at the bottom and 2 inches at the top." The mule's foot was released, after the train arrived at Blakely, by inserting a crowbar between the slats, and "springing" them sufficiently to enable the animal's foot to be extricated. In view of this evidence, it is clear that the primary cause of the injury to the mule was its own inherent viciousness, against liability for the consequences of which the defendant company specially contracted with the plaintiff. The contract between them also recited that the shipper had examined the car provided by the carrier, and found it in good order and condition, and that he had accepted the same as suitable and sufficient for the purpose intended. A shipper who enters into such an agreement must be held to waive all defects in the car furnished him, save such only as are latent, and therefore not readily discoverable by him. The defect, if any, in the car provided by the company for the transportation of the plaintiff's stock, was patent, and might easily have been seen upon even a casual inspection of the car. Indeed, as to this point, the present case is controlled by the recent decision announced by this court in *Williams v. Central R. Co.*, 117 Ga. —, 43 S. E. 980, wherein it was held that a shipper who was a party to special contract such as that appearing in the record now before us was not entitled to prevail in an action for damages for the loss of a mule which got its foot hung between the slats of a stock car, when the shipper relied for a recovery upon evidence which showed "merely that the crack into which the animal got its foot was the space between the slats of the car, some 3½ or 4 feet above the floor thereof." We accordingly hold that the verdict returned in the present case was without any evidence to support it.

Judgment reversed. All the Justices concur.

NOTES.

DUTY TO CARE FOR LIVE STOCK DURING TRANSPORTATION—ASSUMPTION OF DUTY BY SHIPPER.

I. In General.

1. General Rule.
2. Other Statements, and Illustrations, of General Rule.
 - a. Shipper Responsible for His Agent's Acts.
 - b. Failure to Accompany Stock.
 - c. Burden of Proving Negligence Where Stock Is Lost or Injured during Transit.
3. Stipulation Not an Unlawful Limitation of Liability.
4. Shipper's Duty under Federal Statute.

II. Peculiar Circumstances Affecting, or Not Affecting, Carrier's Liability.

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1. Care of Stock Voluntarily Assumed by Shipper.
 2. Shipper's Interference with Management of Car.
 3. Delay Caused by Snow Storm—Duty of Carrier Not Affected by Mere Presence of Shipper's Employee Riding on Free Pass.
 4. Shipper Voluntarily Watching over Stock without Interfering with Carrier's Control.
 5. Abandonment of Stock by Shipper's Agent.
 6. Abandonment of Charge by Shipper's Agent Because of Slight Delay.
 7. Delay Caused by Wreck—Right of Shipper to Abandon Care of Cattle.
 8. Stipulation to Care for Stock in Case of Accidents or Delay—Effect of Unnecessary Delay.
 9. Duty of Shipper to Care for Stock after Arrival at Destination as Affected by Fact That Carrier's Stock Yards Are Too Small.
 10. Failure to Feed and Water after Notice That Train Will Not Stop at Station.
 11. Failure to Water Caused by Carrier's Statement That Detention Would Be Too Brief.
 12. Reliance on Statement of Conductor as to Brakeman's Care of Stock.
 13. Stock Carried beyond Destination.
 14. Duty of Carrier to Throw Water over Hogs Suffering from Heat.
 15. Waiver of Stipulation—Gift of Ticket Enabling Shipper to Ride on Passenger Train.
 16. Volunteering to Carry after Notice of Shipper's Intended Breach of Agreement to Go in Charge of Stock.
 17. Abandonment of Charge by Shipper's Agent—Duty of Carrier.
 18. Loss of Cattle Loaded on Wrong Train—Duty of Loading Voluntarily Assumed by Carrier in Shipper's Presence.
- III. Duty of Carrier to Furnish Facilities and Opportunities.
1. General Rule.
 2. Other Statements, and Illustrations, of General Rule.
 - a. Implied Obligation to Furnish Opportunities to Care for Stock.
 - b. Negligence against Which Carrier Cannot Contract.
 - c. Failure to Provide Safe and Suitable Car.
 - d. Carrier's Duty to Provide Water.
 - e. Delay at Junction—Duty of Initial Carrier.
 - f. Statutory Duty—Stock Yard on Fire and Absence of Request.
 - g. Flood—Assumption of Risk from Delay.
 - h. Furnishing Unsafe Car—Effect of Mere Presence of Owner.
 - i. Point for Watering and Feeding—Evidence—Agreement or Custom.
 3. Circumstances Relieving Carrier from Liability.
 - a. Shipment Requiring Only Three Hours—Absence of Request.
 - b. Duty to Lay Out Car in Which Stock Can Be Fed and Watered.
 - c. Presumption That Cattle Are Not in Need of Food and Water When Tendered for Shipment.
 - d. Right to Deliver to Connecting Carrier without Giving Opportunity to Feed and Water.
 - e. Escape of Cattle—Defective Car—Failure to Notify Station Agent.
 - f. Defective Cars Selected by Shipper.
 - g. Failure to Ask for Opportunity to Feed and Water.
 4. Request for Opportunity to Feed and Water—What Constitutes.
- IV. Whether Contract or Custom Imposed Duty upon Shipper.
1. Mere Proof of Free Passage.
 2. Duty to Care for Stock in Emergencies—Construction of Contract.

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3. Existence of Stipulation—Question for Jury.
4. Validity of Custom Requiring Shipper to Care for Stock.
5. Shipper's Ignorance of Custom.
6. Existence of Usage Requiring Shipper to Accompany and Care for Poultry—Evidence—Statement on Free Pass.
7. Same—Negative Testimony.

I. IN GENERAL.

1. GENERAL RULE.

If the contract of shipment imposes upon the shipper the duty of feeding and watering, and otherwise caring for live stock during transportation, he alone is responsible for any loss or damage resulting from his failure to comply with this stipulation.

United States.—Ormsby *v.* U. P. R. Co. (C. C.), 4 Fed. 706.

Alabama.—Western Ry. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358; Central R. R. & Banking Co. *v.* Smitha, 85 Ala. 47, 4 So. 708; South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606.

Arkansas.—St. L., I. M. & S. Ry. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134.

Georgia.—Cincinnati, New Orleans, etc., Ry. *v.* Disbrow, 76 Ga. 253; Boaz *v.* Central R. Co., 87 Ga. 463, 13 S. E. 711; Comer *v.* Stewart & Bowden, 97 Ga. 403, 23 S. E. 839; Central R. Co. *v.* Bryant, 73 Ga. 722; Seaboard & R. R. Co. *v.* Cauthen & Turner, 115 Ga. 422, 41 S. E. 653.

Illinois.—Wabash, etc., R. Co. *v.* Pratt, 15 Ill. App. 177.

Indiana.—Terre Haute, etc., R. Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. 781.

Iowa.—Burgher *v.* Chicago, R. I. & P. R. Co. (Iowa), 11 Am. & Eng. R. Cas., N. S., 130; Hart *v.* Chicago & N. W. Ry. Co., 69 Iowa, 485, 29 N. W. 597.

Kentucky.—Rhodes *v.* Louisville & Nashville R. R. Co., 72 Ky. 688.

Mississippi.—Johnson *v.* Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534; Mobile, etc., R. Co. *v.* Mullins, 70 Miss. 730, 12 So. 826; Ill. Cent. R. R. Co. *v.* Peterson, 68 Miss. 454, 10 So. 43.

Missouri.—Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Myers *v.* Wabash, St. L. & P. Ry. Co., 90 Mo. 98, 2 S. W. 263; McBeath *v.* Wabash, St. Louis & Pac. Ry. Co., 20 Mo. App. 445; Lowenstein *v.* Wabash R. Co., 1 Mo. App. 592; Dunenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550.

Nebraska.—Chicago, St. P. M. & O. R. Co. *v.* Schuldt (Neb.), 92 N. W. 162, 5 R. R. R. 584, 28 Am. & Eng. R. Cas., N. S., 584.

New York.—Cragin *v.* New York Cent. R. Co., 51 N. Y. 61.

Texas.—Galveston, etc., R. Co. *v.* Ivey (Tex. Civ. App.), 23 S. W. 321; Ft. Worth & Denver City R. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525, 61 Am. & Eng. R. Cas. 322; Taylor, B. & H. R. Co. *v.* Montgomery, 4 Tex. App. 401, 16 S. W. 178.

Virginia.—Chesapeake, etc., R. Co. *v.* Bank, 92 Va. 495, 23 S. E. 935.

West Virginia.—Roderick *v.* Railroad Company, 7 W. Va. 54.

Wisconsin.—Burns *v.* Chicago, etc., Ry. Co., 104 Wis. 646, 80 N. W. 927, 17 Am. & Eng. R. Cas., N. S., 290; Abrams *v.* Milwaukee, L. S. & W. Ry. Co., 87 Wis. 485, 58 N. W. 780.

2. OTHER STATEMENTS, AND ILLUSTRATIONS, OF GENERAL RULE.

In Central R. Co. *v.* Bryant, 73 Ga. 722, it is held that a provision in a contract for the shipment of live stock, providing that the company shall not be bound to feed, water, or care for them, but that the owner, in consideration of a free pass, shall accompany them for that purpose, releases the company from liability for damages resulting from a want of food or water.

In Western Railway Co. *v.* Harwell, 91 Ala. 340, 8 So. 649, it is held that when the contract of shipment contains an express stipulation by the shipper, in consideration of reduced rates, that he will accompany

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and care for the live stock, and his failure to do so proximately contributes to an injury to them, the carrier is not responsible.

In *South & North Alabama R. Co. v. Henlein*, 52 Ala. 606, it is held that the stipulation in a contract of shipment, entered into in consideration of reduced rates and a free pass to the owner, that he shall attend the live stock and care for it, at his own expense, in case of accidents, is reasonable and valid; and the carrier, if not wanting in the diligence required of him, is not liable for losses resulting from the shipper's inattention in these respects.

Where a shipper agrees to personally accompany and care for the watering of live stock transported by a railway company, and is given free transportation for that purpose, and is supplied with proper facilities, he cannot complain of an injury arising from lack of such care in the matter of watering, arising out of his own fault. *Chicago, St. P. M. & O. R. Co. v. Schuldt* (Neb.), 92 N. W. 162, 5 R. R. R. 584, 28 Am. & Eng. R. Cas., N. S., 584.

Where a shipper of live stock assumes, by special contract, the duty of feeding and watering, the only duty of the carrier, in this connection, is that of furnishing the shipper reasonable opportunities for caring for the stock. *Burns v. Chicago, etc., Ry. Co.*, 104 Wis. 646, 80 N. W. 927, 17 Am. & Eng. R. Cas., N. S., 290.

The stock suffered injury through failure on the part of plaintiff's agent to attend to them, it appearing from the contract of shipment that he was in sole charge of the stock "for the purpose of attention and protection of the stock while in transit." It was held that the company was not liable. *Burgher v. Chicago, R. I. & P. R. Co.*, 105 Iowa 335, 75 N. W. 192, 11 Am. & Eng. R. Cas., N. S., 130.

If the shipper contracts to accompany the stock and assume control of them, he cannot recover for a loss or injury to them in course of transportation unless his declaration alleges that the loss or injury was not due to his own neglect of duty. *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 136, 31 N. E. 781, 32 Am. St. Rep. 239, 55 Am. & Eng. R. Cas. 326.

In *Seaboard & R. R. Co. v. Cauthen & Turner*, 115 Ga. 422, 41 S. E. 653, 2 R. R. R., 513, 25 Am. & Eng. R. Cas., N. S., 513, it is held that where in a special contract for the transportation of live stock it expressly stipulated that "in case of accidents or delays from any cause whatever, the owner and shipper is to feed, water, and to take proper care of stock at his own expense," and that the owner or person in charge of the stock is to have "all proper facilities on trains and at stations for taking care of the stock so shipped, he being, for this purpose, furnished free transportation and required to ride upon the trains carrying the stock, there is no duty upon the railroad company of feeding or watering the animals, and it cannot under such a contract, be held liable for any damages resulting from a failure on his part to do so.

a. Shipper Responsible for His Agent's Acts.

While a carrier is held to be an insurer of the safety of property while he has it in his possession as a carrier, the rule does not apply where live stock is transported in a car left in the exclusive control of the shipper's agent, and is destroyed by his act; and in such case it is immaterial whether the agent was careful or negligent. So held in *Hart v. Chicago & N. W. Ry. Co.*, 69 Iowa 485, 29 N. W. 597.

b. Failure to Accompany Stock.

In *Georgia R. & B. Co. v. Reid*, 55 Am. & Eng. R. Cas. 363, 91 Ga. 377, 17 S. E. 934, it is held that where the stipulation in a special contract contemplated that the shipper or his agent should accompany the stock while in transit, and contained a provision that in case of accident or delay, it should be the duty of the shipper or agent to feed, water, and take care of the stock, the court should have given the charge requested by defendant, that "under this contract it was the duty of the plaintiff or one of its agents to accompany the stock;

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and, if the loss or damage was the result of his not accompanying the stock, then he could not recover."

c. Burden of Proving Negligence Where Stock Is Lost during Transit.

In *McBeath v. Wabash, St. Louis & Pac. Ry. Co.*, 20 Mo. App. 445, it is held that in case of special contract, whereby the owner agrees to, and does, take charge of the stock, the burden is upon him to prove negligence on the part of the carrier where stock is lost during transit. In *St. L. I. M. & S. Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, it is held that where stock is shipped on a railroad, under a contract limiting the carrier's liability, and pursuant to such contract, the shipper takes charge of the animals during transportation, the burden of proof is upon him, in an action against the carrier to recover for the loss of them, to show that negligence of the carrier was the cause of the loss. In this case it is said in the opinion: "But in this case there was a restriction upon the common-law liability of the carrier. Appellees agreed to load the cars, and unload, feed, water, and attend to them at their own expense and risk while in the stock yards of the carriers awaiting shipment, and on the cars, or at feeding or transfer points, or when the same might be taken from the cars for any purpose, and to see that the cars were securely fastened and for that purpose, one of them was allowed to ride, and did ride on the train with the stock, * * * free of additional charge. Under the contract, they took charge of the stock during transportation, and relieved appellant of any responsibility for the discharge of those duties of a common carrier which they undertook to perform, and confined its duties, * * * to the furnishing suitable cars and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier which makes it a duty to account for the loss of freight, did not devolve on appellant. Being in charge, they were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they are entitled to recover."

3. STIPULATION NOT AN UNLAWFUL LIMITATION OF LIABILITY.

The agreement that the shipper shall accompany the stock and be responsible for its care is, when proper facilities are supplied, not a limitation of the carrier's liability, as contemplated by section 4, art. 11, of the state constitution. *Chicago, St. P. M. & O. R. Co. v. Schuldt* (Neb.), 92 N. W. 162, 5 R. R. R. 584, 28 Am. & Eng. R. Cas., N. S., 584.

The care of live stock while being transported is a mere incident to its transportation, and transportation agencies have the right to contract against their assumption of liability that accrues to them merely as bailees, and in common with other bailees, and not strictly as common carriers. *Chicago, St. P. M. & O. R. Co. v. Schuldt* (Neb.), 92 N. W. 162, 5 R. R. R. 584, 28 Am. & Eng. R. Cas., N. S., 584.

In *Duvenick v. Mo. Pac. Ry. Co.*, 57 Mo. App. 550, it is held that though the carrier must afford the shipper an opportunity to feed and water his stock, by putting the car at the proper place at the proper time; the carrier may be relieved of any obligation to unload, feed and water by the terms of the contract of shipment, as it is competent for him to contract that the shipper shall accompany his live stock, and unload, water, and feed it.

In *Ormsby v. U. P. R. Co.* (C. C.), 4 Fed. 706, it is held that a stipulation in a contract of shipment requiring that the shipper shall go with his stock and take charge of it may be valid.

4. SHIPPER'S DUTY UNDER FEDERAL STATUTE.

In *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, it is held that a special contract by which the shipper assumes the duty of feeding and watering his live stock relieves the carrier from such duty; and the shipper is bound to such duty when reasonable facilities there-

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for are furnished by the carrier. This duty is imposed upon the shipper under Act of Congress, Rev. Stats. U. S., sec. 4387.

II. PECULIAR CIRCUMSTANCES AFFECTING, OR NOT AFFECTING, CARRIER'S LIABILITY.

1. CARE OF STOCK VOLUNTARILY ASSUMED BY SHIPPER.

If the shipper volunteers or undertakes to assume the duty as to the care of the stock, feeding and watering them, he alone is responsible for a neglect to discharge it. *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606.

2. SHIPPER'S INTERFERENCE WITH CARRIER'S MANAGEMENT OF CAR.

In *Roderick v. Railroad Company*, 7 W. Va. 54, it is held that a common carrier will not be liable for injury to a horse occasioned by the improper or unwarrantable interference of the shipper or his agent with the management of the car by the servants of the railroad.

3. DELAY CAUSED BY SNOW STORM—DUTY OF CARRIER NOT AFFECTED BY MERE PRESENCE OF SHIPPER'S EMPLOYEE RIDING ON FREE PASS.

In *Feinberg v. Delaware, L. W. R. Co.*, 52 N. J. L. 451, 20 Atl. 33, it appeared that plaintiff's live stock was accepted for transportation without express contract or limitation; that, being delayed by a snow storm, they were put in the railroad's stock yard, where some died, and others were injured by cold and exposure. It was held that the mere fact that plaintiff's servant, riding on a free pass, given by the company's freight agent, accompanied the cattle did not relieve the carrier from liability.

4. SHIPPER VOLUNTARILY WATCHING OVER STOCK WITHOUT INTERFERING WITH CARRIER'S CONTROL.

In *Hannibal, etc., Railroad v. Swift*, 12 Wall. (U. S.) 262, it is held that it is not a ground for limiting the responsibility of a common carrier where no interference is attempted with his control of the property carried, that the owner of the property accompanied it, and kept watch for its safety. But in this case it appeared that the control and management of the car, or of the train, by the railroad employees, were not impeded or interfered with.

5. ABANDONMENT OF STOCK BY SHIPPER'S AGENT.

In *Louisville & N. R. Co. v. Martin*, 8 Ky. Law Rep. 432, it appeared that a shipper of live stock, who had contracted to travel in charge of it, started on the train, but abandoned it without notice to the trainmen. It was held that there could be no recovery for loss resulting from the shipper's failure to attend to the stock, as it could not be claimed that the carrier had waived the shipper's agreement to go with the stock.

6. ABANDONMENT OF CHARGE BY SHIPPER'S AGENT BECAUSE OF SLIGHT DELAY.

In *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, it is held that where there was a slight delay of a train carrying live stock, and where little injury could have resulted merely from the delay, it was negligence in the shipper for his agent, in charge of the live stock to refuse to feed and water the stock where facilities therefor were furnished by the railway company, and the wants of the cattle demanded such attention.

7. DELAY CAUSED BY WRECK—RIGHT OF SHIPPER TO ABANDON CARE OF CATTLE.

In *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, it is held it is not the negligence of the carrier, but the extent of the injury that might reasonably be expected to flow therefrom, and the expense likely to be incurred in an attempt to avert loss, which must be looked to in determining whether a shipper, in case of a railway wreck and delay incident and injury resulting to live stock shipped,

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had the right to rescind the contract of shipment and to refuse to feed and water the stock as he had agreed to do.

8. STIPULATION TO CARE FOR STOCK IN CASE OF ACCIDENTS OR DELAY—EFFECT OF UNNECESSARY DELAY.

Where the shipper contracts that, "in case of accidents to or delays of time from any cause whatever" he "is to feed, water, and to take proper care of the stock at his own expense," he cannot recover for injuries resulting from his failure to perform his undertaking, although the carrier may have consumed more time than was necessary in the transportation. So held in *Boaz v. Central R. Co.*, 87 Ga. 463, 13 S. E. 711.

9. DUTY OF SHIPPER TO CARE FOR STOCK AFTER ARRIVAL AT DESTINATION AS AFFECTED BY FACT THAT CARRIER'S STOCK YARDS ARE TOO SMALL.

In *Myers v. Wabash, St. L. & P. Ry. Co.*, 90 Mo. 98, 2 S. W. 263, it is held that where, by the terms of contract for the shipment of sheep, the shipper, in consideration of reduced rates, is to care for them while in transit, and attend to loading and unloading them, and assume all risk incident thereto, and all injuries from any cause, he cannot cast the duty upon the carrier of caring for the sheep after being unloaded at their destination, although its yards were too small to hold them all.

10. FAILURE TO FEED AND WATER AFTER NOTICE THAT TRAIN WILL NOT STOP AT STATION.

In an action against a railroad company for damage to horses transported, where the question is the alleged contributory negligence of plaintiffs, in failing to feed the horses at a certain station, whereby, it is claimed, they became weak and more subject to injury, it is error to charge, as matter of law, that plaintiffs were not negligent as to this, if they were informed by an employee of defendant that the cars containing the horses would not be delayed at such station. In such case, the question of contributory negligence is one of fact for the jury. So held in *Mobile, etc., R. Co. v. Mullins*, 70 Miss. 730, 12 So. 826.

11. FAILURE TO WATER CAUSED BY CARRIER'S STATEMENT THAT DETENTION WOULD BE TOO BRIEF.

A train conveying cattle was detained sixteen hours at an intermediate station, in constant readiness to start when another train, which was belated, should arrive. The owner of the cattle proposed to take them out of the cars and to water them, but refrained on being informed by the carrier that the cars might start within a period too brief for that purpose. It was held that, the carrier having control of the train, the owner was not required to demand that the train should proceed, nor to persist in attempting to water the cattle until forcibly resisted; and that the carrier was responsible for any injury to the cattle from their not being watered at the place of detention. *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232.

12. RELIANCE ON STATEMENT OF CONDUCTOR AS TO BRAKEMAN'S CARE OF STOCK.

Where the shipper of live stock was, under a special contract with a railroad company, required to take care of the animals during transportation, and there was some evidence tending to show that the train did not stop long enough for the shipper to look after them, and that, in answer to his inquiry at one of the stopping places whether the train would stop long enough for him to do so, he was told by the conductor to lie down as the brakeman was watching his cattle, it was held that the question of negligence on the part of the carrier was properly submitted to the jury. *Dawson v. St. Louis, Kansas City & N. Ry. Co.*, 76 Mo. 514.

13. STOCK CARRIED BEYOND DESTINATION.

A provision in a contract for shipment of live stock, providing that the owner was to feed and water the stock, and that the company should afford reasonable facilities for doing so, does not relieve the company

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from the duty of feeding and watering, where the animals are carried beyond their place of destination and there detained several days before they are returned. So held in *Bryant v. Southwestern R. Co.*, 6 Am. & Eng. R. Cas. 388, 68 Ga. 805.

14. DUTY OF CARRIER TO THROW WATER OVER HOGS SUFFERING FROM HEAT.

A stipulation in a contract of shipment under which it is the shipper's duty to feed and water his live stock while in the cars, cannot relieve the carrier of the consequences of its negligence in failing to throw water over hogs to save them from the effects of heat while in the cars. So held in *Illinois Cent. R. R. Co. v. Adams*, 42 Ill. 474.

15. WAIVER OF STIPULATION—GIFT OF TICKET ENABLING SHIPPER TO RIDE ON PASSENGER TRAIN.

In *Central R. R. & Banking Co. v. Smitha*, 85 Ala. 47, 4 So. 708, it is held that a stipulation in a contract of shipment, by which the shipper agrees "to load, unload and transfer said stock at his own risk, with the assistance of the railroad agents, and in case of accidents, or delays from any cause whatever, to feed, water and take care of the stock at his own expense," being furnished all proper facilities by the railroad, contemplates that he shall himself accompany the stock the entire route, and perform the stipulated services; and the fact that at one of the stations on the route, on presentation of his bill of lading, the agent in charge gave him a ticket which enabled him to travel on a passenger train though he might have traveled on the train with his stock, does not show a waiver of these stipulations, nor relieve him from the performance of the specified services.

16. VOLUNTEERING TO CARRY AFTER NOTICE OF SHIPPER'S INTENDED BREACH OF AGREEMENT TO GO IN CHARGE OF STOCK.

In *Louisville & N. R. Co. v. Spalding*, 8 Ky. Law Rep. —, it is held that if a carrier undertakes to carry live stock, after it is notified that the shipper does not intend to fulfill his agreement to go in charge of them, the same degree of care is required of him as if the shipper had made no such agreement.

Where a shipper of live stock agrees to furnish a care taker, and fails to do so, the carrier, if it has knowledge of such failure and proceeds under the shipping contract, is liable for any loss resulting from its failure to provide the stock with proper care and protection. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 21 Am. & Eng. R. Cas., N. S., 175.

17. ABANDONMENT OF CHARGE BY SHIPPER'S AGENT—DUTY OF CARRIER.

In *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, it is held that the abandonment of the charge of live stock by the agent of the shipper does not impose the burden of such care upon the carrier to the extent of relieving the shipper of his duty to care for his stock under his shipping contract.

18. LOSS OF CATTLE LOADED ON WRONG TRAIN—DUTY OF LOADING VOLUNTARILY ASSUMED BY CARRIER IN SHIPPER'S PRESENCE.

In *Norfolk & W. R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127, it appeared that the plaintiff shipped cattle over defendant railroad company's line to a point on another line, the bill of lading providing that plaintiff should load, unload, and transfer them at his own cost at a point on the defendant's line. The cattle were unloaded, fed, and reloaded by defendant, though plaintiff was present and ready to take care of the stock. In the reloading, some of the cattle were placed in the car of another shipper. It was held that the defendant was liable for the mistake.

III. DUTY OF CARRIER TO FURNISH FACILITIES AND OPPORTUNITIES.

1. GENERAL RULE.

It is the duty of the carrier to furnish sufficient facilities and oppor-

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tunities for caring for live stock, even where the contract of shipment provides that the stock shall be loaded, unloaded, fed, watered, and otherwise cared for by the shipper or owner while in transit. •

Georgia.—Bryant *v.* Southwestern R. Co., 68 Ga. 805, 6 Am. & Eng. R. Cas. 388; Comer *v.* Stewart, 97 Ga. 403, 23 S. E. 839; Nashville, etc., R. Co. *v.* Heggie, 86 Ga. 210, 12 S. E. 363.

Illinois.—Wabash, etc., R. Co. *v.* Pratt, 15 Ill. App. 177.

Kansas.—Atchison, T. & S. F. R. Co. *v.* Ditmars, 3 Kan. App. 459, 43 Pac. 833.

Michigan.—Smith *v.* Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 61 Am. & Eng. R. Cas. 321.

Missouri.—Lowenstein *v.* Wabash R. Co., 1 Mo. App. 592; Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Johnson *v.* Alabama, etc., R. Co., 57 Mo. App. 550.

New Jersey.—Feinberg *v.* Delaware, etc., R. Co., 52 N. J. L. 451, 20 Atl. 33, 45 Am. & Eng. R. Cas. 348.

New York.—Bills *v.* New York Cent. R. Co., 84 N. Y. 5, 3 Am. & Eng. R. Cas. 318; Harris *v.* Northern Ind. R. Co., 20 N. Y. 232.

Texas.—International, etc., R. Co. *v.* Lewis (Tex. Civ. App.), 23 S. W. 323; Gulf, etc., R. Co. *v.* Gann, 8 Tex. Civ. App. 620, 28 S. W. 349; International, etc., R. Co. *v.* McRae, 82 Tex. 614; Ft. Worth & D. C. Ry. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525; Galveston, etc., R. Co. *v.* Ivey (Tex. Civ. App.), 23 S. W. 321; Taylor, B. & H. R. Co. *v.* Montgomery, 4 Tex. App. 401, 16 S. W. 178.

Virginia.—Chesapeake, etc., R. Co. *v.* Bank, 92 Va. 495, 23 S. E. 935.

Wisconsin.—Burns *v.* Chicago, etc., Ry. Co., 104 Wis. 646, 80 N. W. 927, 17 Am. & Eng. R. Cas., N. S., 290; Abrams *v.* Milwaukee, etc., Ry. Co., 87 Wis. 485, 58 N. W. 78.

2. OTHER STATEMENTS, AND ILLUSTRATIONS, OF GENERAL RULE.

The mere failure of a common carrier to furnish the shipper necessary facilities to water and feed his stock in transit may subject it to liability. So held in Comer *v.* Columbia, N. & L. R. Co., 52 S. Car. 36, 29 S. E. 637.

Whenever it may become necessary to unload live stock during transit for the purpose of watering or feeding, it is the duty of the carrier to have the proper facilities for unloading. So held in Dunn *v.* Hannibal & St. J. R. Co., 68 Mo. 268.

In Comer *v.* Stewart, 97 Ga. 403, 23 S. E. 839, it is held that, although the shipper by rail of live stock under a special contract was by its terms bound in case of accident or delay from any cause whatever to feed, water and take proper care of the stock at his own expense, yet where such agreement further stipulated that the carrier's employees should provide the owner or person in charge of the stock all proper facilities on train and at stations for taking care of the same, if injuries to the stock resulted from want of food, water and attention because of the carrier's failure to furnish such facilities at the proper time upon the arrival of the stock at destination, the carrier would be liable for such injuries.

In Smith *v.* Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, it is held that where a railroad company accepts a horse for shipment over its road, under a contract which provides that they are to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner, and his expense or risk, the company, as a bailee for hire, having control of the cars in which the horses are placed, is bound at least to furnish the shipper an opportunity to give the animals the care which they may require.

In Lowenstein & Thomas *v.* Wabash Ry. Co., 63 Mo. App. 68, it is held that a carrier of live stock must afford opportunity for feeding and watering the same though the contract imposes the duty of feeding and watering upon the shipper.

The special contract entered into by the shipper and the defendant railroad, whereby the former was to feed and water, relieved the car-

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rier of the duty in the first instance of feeding and watering at such points where it furnished reasonable facilities for the shipper to do so, but in the absence of such facilities at any point, the contract would be unreasonable as to such point, and the carrier would be liable for any damage resulting from the failure to feed and water at such point. So held in *Ft. Worth & Denver City R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, 61 Am. & Eng. R. Cas. 322.

a. Implied Obligation to Furnish Opportunities to Care for Stock.

In *Abrams v. Milwaukee, Lake Shore & Western R. Co.*, 87 Wis. 485, 58 N. W. 780, it is held that it is competent for a railroad company to stipulate with the owners of live stock that they shall load, unload, feed, water and take care of the stock, while it is in transit at their own expense; but that such a stipulation itself raises an implied obligation on the part of the carrier to furnish the shipper the requisite opportunities for complying with its terms.

In *Smith v. Mich. Cent. R. Co.*, 100 Mich. 148, 58 N. W. 651, it is held that the provision "that the stock is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner" does not mean that the duty is to be performed by the shipper while the train is in motion, and without being afforded an opportunity by the company to perform it, but, if such provision should be given any force, it creates a very fair inference that the company will afford the opportunity to perform the duty which it has seen fit to impose upon him.

b. Negligence against Which Carrier Cannot Contract.

In *Chesapeake, etc., R. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, it is held that although the contract of a common carrier of live stock stipulates that the owner shall load, feed, water, and unload his stock at his own risk and expense, yet it is the duty of such carrier to furnish suitable and safe facilities for loading and unloading the stock, and also for watering and feeding them while being carried over its line, and a failure to provide such facilities is negligence, for the results of which it is liable, and against which he cannot contract.

c. Failure to Provide Safe and Suitable Car.

In *Rhodes v. Louisville & Nashville R. R. Co.*, 72 Ky. 688, it appeared that a railroad company undertook the transportation of cattle under a special agreement, by which the owner of the cattle assumed all injury, loss, or damage which might be occasioned in certain contingencies, including the escaping of the cattle, or possible injury to them by fright or their own viciousness, as well as any other injury which might happen to them incidental to transportation, not caused by the fraud or gross negligence of the railroad company. It was held that while this special contract devolved on the owner the personal care of the cattle, with the duties and risk connected with it, it did not exonerate the company from responsibility for damage resulting from a failure to provide a suitable and safe car for the carriage of the cattle.

d. Carrier's Duty to Provide Water.

A provision in a contract for the shipment of live stock, providing that the shipper shall accompany the stock and feed and care for them at his own risk, does not relieve the carrier from the duty of providing water for the stock at suitable points along the line, so that the owner can give it to the stock. *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177.

e. Delay at Junction—Duty of Initial Carrier.

In *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268, it is held that where a railroad company undertook to transport live stock to a point beyond its own line, and on the line of a connecting company, and upon the arrival of the train at the junction it was found that the stock could not be forwarded immediately, and that, to prevent damage, it should be unloaded, fed and watered, it became the duty of the first company to see that this was done; and such duty could not be imposed upon the owner, although he was accompanying the stock under a contract

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providing that he should take care of, water and feed them while under transportation.

f. Statutory Duty—Stock Yards on Fire and Absence of Request.

In *Nashville, etc., Railway Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, it is held that, under sec. 4386, Rev. St. U. S., providing that live stock shall not be kept upon cars for more than twenty-eight consecutive hours without unloading for rest, water and food, that the company's stock yards at its feeding station were on fire when the train arrived there, was no sufficient excuse for not furnishing to the person in charge of the stock, in compliance with the contract of shipment, all proper facilities for taking care of them, nor for not stopping the car containing them there or at some other station, in compliance with the statute, so that they might be unloaded, watered and fed; and that the company was not excused from liability by the fact that the person in charge of the stock was deficient in urging compliance with the statute, for the company's servants should have known of such want of diligence on his part, and it was their duty to select the place of stopping with or without his request.

g. Flood—Assumption of Risk from Delay.

Plaintiff's cattle were transported by defendant under a contract providing that in consideration of a reduced rate, plaintiff would assume the risk of damage from delay; and would load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was detained by a flood, and the cattle, being without food, were damaged. It was held that it was defendant's duty, upon reasonable request, to place the cars so as to be convenient to the usual and accessible means of unloading, if practicable. *Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

h. Furnishing Unsafe Car—Effect of Mere Presence of Owner.

In *Peters v. New Orleans, Jackson & Great Northern R. R. Co.*, 16 La. Ann. 222, it is held that where the defendant railroad company undertook to transport for the plaintiff a car load of live stock, it was bound to furnish a suitable and safe car, and was responsible for any loss arising from neglect of duty in this particular; that the mere presence of the owner, who had agreed to care for the cattle, did not lessen this responsibility if he had no power over the train, nor right to make any change in the disposition of the cars, which were necessarily under the control of the defendant's agents.

i. Point for Watering and Feeding—Evidence—Agreement or Custom.

In *Lowenstein & Thomas v. Wabash Ry. Co.*, 63 Mo. App. 68, it is held that if a bill of lading covers the point for watering and feeding stock, oral evidence is inadmissible to show a different place by agreement or custom, but where the bill of lading does not designate the place where such feeding and watering shall take place, parol evidence is admissible to show an agreement or custom.

3. CIRCUMSTANCES RELIEVING CARRIER FROM LIABILITY.

a. Shipment Requiring Only Three Hours—Absence of Request.

In *Texas & P. Ry. Co. v. Stribling* (Tex. Civ. App.), 34 S. W. 1002, it is held that a charge in an action by a shipper to recover from a carrier for injuries to cattle in shipment, which states it to have been the duty of the carrier to feed and water the cattle en route, or to give the shipper an opportunity to do so, is erroneous as not applicable to the evidence, where the shipment required but about three hours' time, and no request to stop for feed or water was made by the shipper.

b. Duty to Lay Out Car in Which Stock Can Be Fed and Watered.

In *Ill. Cent. R. R. Co. v. Peterson*, 68 Miss. 454, 10 So. 43, it is held that where, under a special freight contract, a railroad company furnishes an entire box car to a shipper, who loads it with "emigrant movables" and several horses, the contract requiring him to load and unload the car and to accompany it, and feed, water and care for the

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stock, all at his own risk and expense, and exempting the company from liability for delays of the train, and there is no agreement as to any lay-out along the route, and the stock can be fed and watered without leaving the car, the owner does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out along the route that he may rest his horses and rearrange his load. And, under such contract, if, by the owner's method of arranging the horses in the car, they can only be taken out with great trouble and delay, and a lay-out on the route becomes necessary to save the horses from suffering or death, this does not entitle the owner to demand that the car be laid out and afterwards carried under the same contract. And the owner can only secure such delay by abandoning the contract, or by contracting anew for the use of the car for a longer time. If he does not do this, the company may refuse to lay out the car and is not liable for the injury to the animals caused by the continuous journey. In this case it is said in the opinion: "If he had this right (that the car be laid out at a certain point), how was it acquired? Was it an implied obligation resting upon the railroad? If it finds rest under the contract, it will be found by implication. There is no expressed obligation of this character appearing in the face of the instrument. If it was an implied obligation on the part of the railroad, how is the implication raised? If it was the custom of the railroad company to lay out cars in which a few horses were carried, then there was an implied obligation assumed to comply with such custom, on the part of the railroad. But the undisputed evidence perfectly shows, that while it was the custom to lay out car-load lots of animals every 24 or 28 hours, in order that they might be fed, watered and cared for, no such custom prevailed or existed in cases where a few animals only were loaded in a car, and where provision was made thereon for watering and feeding the animals. The custom was unknown in cases of the latter character. Nor does the absence of custom seem unnatural, there being no necessity, apparently, in ordinary cases, for any unloading. The cases referred to by appellant's counsel in 42 Ill. 474, and 71 Ib. 434, raised an implied obligation on the carrier to throw water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal. The other case relied on by counsel for appellee is that of *Kinnick v. Chicago, R. I. & P. R. Co.*, 69 Iowa 665, 29 N. W. 772, 27 Am. & Eng. R. Cas. 55. In that case the railroad company received a car load of hogs from plaintiff, and after loading and starting them on their journey, there was such delay by reason of the wrecking of another train, that a number of the hogs died, and the court held, as the natural propensity of hogs is to struggle to get near or away from the doors of a car, which is left standing, and to "pile up" on each other in such struggles, and thereby produce injury or death, and it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the twelve hours during which the train was standing still, because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done. We fail to see any support, in any of these cases, for the proposition that there was an implied obligation, in the case at bar, upon the railroad company to lay out the car."

c. Presumption That Cattle Are Not in Need of Food and Water When Tendered for Shipment.

In *Texas & P. Ry. Co. v. Stribling* (Tex. Civ. App.), 34 S. W. 1002, it is held that under the Texas statute allowing the recovery of a penalty from a carrier for a failure to properly care for stock in shipment, a carrier has the right to act on the presumption that stock is in proper condition when tendered for shipment, and is not required to give

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opportunities to feed and water oftener than would be done by an ordinarily prudent man with his own stock.

d. Right to Deliver to Connecting Carrier without Giving Opportunity to Feed and Water.

In *Texas & P. Ry. Co. v. Stribling* (Tex. Civ. App.), 34 S. W. 1002, it is held that where a contract for shipment of cattle terminated in delivery of the stock to a connecting carrier, on arrival at the junction, the carrier had the right to deliver to the connecting carrier at once, and could not be held liable for damages for not holding the cattle to give the shipper an opportunity to water and feed.

e. Escape of Cattle—Defective Car—Failure to Notify Station Agent.

In *Betts v. Farmers' Loan and Trust Co.*, 21 Wis. 81, it is held that where the owner of cattle shipped by railroad, or his agent who undertook to put them on the car, knew that the car was in an unsafe condition, and neglected to inform the station agent, who was ignorant of the fact, there could be no recovery for injuries received by the cattle in escaping from the car in consequence of such defect.

f. Defective Cars Selected by Shipper.

In an action against a railroad company to recover for the loss of hogs which escaped from the cars while in the course of transportation, it appeared that the bill of lading provided that the hogs shipped should be taken care of by the owner, and the company should not be liable for loss of hogs by jumping from the cars, except it should occur by reason of collision of trains, or when cars were thrown from the track. The hogs in question were shipped in cars belonging to another company, and selected by the plaintiff, he refusing to use the cars of the defendant. It was held that if the hogs escaped from these cars by reason of any defect in them, or of the door fastenings, the defendant would not be responsible if the company did not know the fact when the plaintiff selected them. *Illinois Cent. R. Co. v. Hall*, 58 Ill. 409.

g. Failure to Ask for Opportunity to Feed and Water.

When a clause in a contract of shipment stipulates that the consignor is to feed and water the stock while in transit, an instruction that the carrier is liable if it failed to give the consignor an opportunity to feed and water is erroneous, where there is no evidence showing that the consignor asked for an opportunity to feed and water. So held in *Mobile & O. R. Co. v. Francis* (Miss.), 9 So. 508.

In *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.* (C.C.), 41 Fed. Rep. 913, it is held that, under Rev. St. Tex. art. 284, providing that it shall be the duty of the common carrier to feed and water live stock during transit, unless otherwise provided by special contract, the carrier is not liable, when it appears that it was agreed that plaintiff should water and feed cattle, and the carrier was to stop for the purpose at a particular place, and there is no evidence that the carrier was requested to stop before reaching the place named. But see following case.

Duty Not Affected by Absence of Request.

Where live stock are shipped under a contract that the shipper shall feed and water them while en route the carrier cannot avoid liability for a failure to properly feed and water, without showing that it offered the shipper reasonable facilities for doing so; neither will the shipper's failure to notify the carrier of his wish and readiness to feed and water affect the carrier's liability. *Taylor, B. & H. R. Co. v. Montgomery*, 4 Tex. App. (Civ. Cas. 401, 16 S. W. 178.

4. REQUEST FOR OPPORTUNITY TO FEED AND WATER—WHAT CONSTITUTES.

Defendant's agent being chargeable with notice that plaintiff's horses had been on the cars without water more than 33 hours, a statement to such agent by plaintiff, at 2:30 p. m. to the effect that the horses ought to go somewhere to be fed and watered, and that if they did not get to their destination before dark (which did not seem probable) they could not be fed or watered that night, was equivalent to a request that the

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cars be placed where such feeding and watering could be done. So held in *Burns v. Chicago, etc., Ry. Co.*, 104 Wis. 646, 80 N. W. 927, 17 Am. & Eng. R. Cas., N. S., 290.

IV. WHETHER CONTRACT OR CUSTOM IMPOSED DUTY UPON SHIPPER.

1. MERE PROOF OF FREE PASSAGE.

In *Clarke v. Rochester & Syracuse R. Co.*, 14 N. Y. 570, it is held that the fact that a shipper is allowed a free passage on the train in which his horses are to be carried does not prove that he is to attend to their safety during the journey.

2. DUTY TO CARE FOR STOCK IN EMERGENCIES—CONSTRUCTION OF CONTRACT.

A railroad shipped a car load of stock, the contract to ship providing: "And it is further agreed, that in case of accidents or delay of time from any cause whatever, the owners or shippers are to feed, water and take proper care of stock." The lower court charged that in all cases of unavoidable delay, the railroad was under this provision, obligated to feed and water the stock. It was held that this was error; that the contract, properly construed, only provided that the owner or shipper should feed and water the stock in certain defined emergencies, but did not mean that in all other cases the carrier should do so. *Louisville, etc., R. Co. v. Trent*, 11 Lea (Tenn.) 82, 16 Am. & Eng. R. Cas. 170.

3. EXISTENCE OF STIPULATION—QUESTION FOR JURY.

In *Cincinnati, New Orleans, etc., Ry. v. Disbrow & Co.*, 76 Ga. 253, it is held that, where suit was brought for injuries, to live stock, occurring from want of proper feeding, watering and attention during a through shipment over a railroad and its connecting lines, and the plaintiff contended that the only written contract of shipment was contained in the bill of lading, and that one of them had a certain verbal agreement with the agent of the defendant as to obtaining a free ticket, or a ticket at a reduced rate; while the defendant contended that the shipment was made under a special written contract, signed by its agent and the person who delivered the stock as the agent for the plaintiffs, in which contract it was specified that one of the plaintiffs was to accompany the stock on the route, and attend to loading, unloading, and watering them, and to relieve the company from all responsibility for their safe transportation, except such damage as resulted from defendant's negligence; and where it appeared that the person delivering the stock to the defendant returned to one of the plaintiffs the contract which was signed in duplicate, together with the bill of lading and an order for a ticket at reduced rates, and that such plaintiff obtained the ticket, and traveled upon a passenger train, instead of the train containing the stock, the court should have submitted to the jury whether the contract of shipment was that contended for by the plaintiff or by the defendant.

4. VALIDITY OF CUSTOM REQUIRING SHIPPER TO CARE FOR STOCK.

In *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, it was held that the duty of a carrier to care for live stock during transportation cannot be transferred to the shipper by a custom requiring the shipper to accompany, and feed and water it at his own risk and expense. In this case it is said in the opinion: "Such a custom would be bad, because railroads cannot legally refuse to ship live stock. A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should ever be so common and uniform it could not be sustained, because it, the custom, would be against law."

5. SHIPPER'S IGNORANCE OF CUSTOM.

A requirement by a railroad company that the shipper of live stock shall accompany it, and provide for it at his own risk and expense, as a condition to receiving the stock as freight, is unreason-

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able; and defendant, in action for the loss of such stock, cannot prove a custom under which a shipper must care for his stock during transit, in order to avoid liability for failure to so provide and care for the stock, unless it is also shown that the shipper was aware of the existence of the custom and did not object at the time of shipment. So held in *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

6. EXISTENCE OF USAGE REQUIRING SHIPPER TO ACCOMPANY AND CARE FOR POULTRY—EVIDENCE—STATEMENT ON FREE PASS.

In a suit against a railroad company for the loss of poultry shipped, the company introduced a witness, to prove that the plaintiff had used the stock passes of the company, and then offered in evidence one of those blank passes, on the back of which was a statement that the owner of stock should feed and take care of it at his own expense and risk, and that he assumed all risk of injury that the animals might do themselves, or that might arise from the delay of trains or otherwise. It was held that this evidence did not tend to prove the existence of a usage of railroads to carry such freight only when accompanied by the shipper, and at his risk. *Evansville & C. R. Co. v. Young*, 28 Ind. 516.

7. SAME—NEGATIVE TESTIMONY.

Where, in a suit against a railroad company for the loss of poultry shipped, the defense was a usage by railroads to carry such freight only when accompanied by the owner and at his risk, and that the loss had occurred through the fault of the owner, in not keeping the coops properly righted on the cars, it was held that evidence from the plaintiff, and others who had been accustomed to ship on railroads, that they had never heard of such usage, was admissible. *Evansville & C. R. Co. v. Young*, 28 Ind. 516.

A. R. Y.

WILLIAMS v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, Oct. 14, 1903.)

[96 N. W. Rep. 774.]

Instructions.

An instruction, in a personal injury action by an employee against his employer, that, in order to recover, plaintiff must establish "all the material allegations of his petition," was objectionable, as leaving the jury to determine what allegations of the petition were material.

Same.

It also imposed on plaintiff a greater burden than he was required to bear, it not being essential to a recovery to prove the allegations of the petition with reference to the extent and nature of the injury sustained.

Same.

Instructions submitting to the jury matters concerning which there is no controversy in the evidence are improper.

Employers' Liability Act—Applications.

Code, § 2071, providing that railroad companies shall be liable to their employees for damages resulting from the negligence of their agents and servants when connected with the use and operation of any railway, renders them so liable to any employee engaged in work exposing him to the hazards arising from the operation of a railroad.

*Williams v. Iowa Cent. Ry. Co***Same—Same—Railroad Work.***

A servant employed by a railroad company in unloading rails from a car in a repair train by means of a cable was connected in his employment with the use and operation of the company's railway within Code, § 2071, relating to the liability of railroad companies for the negligence of employees.

Contributory Negligence—Instruction.

In an action by a servant employed with others in unloading rails from a car in a repair train, an instruction that, if plaintiff gave the signal to move the train, and as a result of such movement he was injured he could not recover, was erroneous, as ignoring the question of due care for his safety by his associates, and due care on his own part in giving the signal.

Appeal from District Court, Mahaska County; W. G. Clements, Judge.

Action at law to recover damages for personal injuries sustained by plaintiff while in defendant's service. Verdict and judgment for defendant, and plaintiff appeals. Reversed.

Carver & Wooster and Rickel, Crocker & Tourtellot, for appellant.

George W. Seevers and J. O. Malcolm, for appellee.

WEAVER, J. Plaintiff claims that in the year 1899 he was in the employ of the defendant corporation, assisting in the operation of a construction or repair train, and that in pursuance of such service he undertook, with others, to distribute steel rails along the defendant's track. The unloading was accomplished by the use of two cables, one end of which was clamped to the track and the other hooked to a rail on the car, after which the train was moved forward, pulling the rail from the load. At the time in question the iron was being unloaded from a stock car, and two men riding in the car were charged with the duty of placing the rails in proper position to be hooked and drawn through the door or opening. Other men attended to the clamps at the rear end of the cables, while plaintiff and another unloosed the hooks from the unloaded rails, and carried them forward to repeat the process. Plaintiff alleges that while he was thus engaged the men in the car failed to use reasonable care in placing and preparing one of the rails for unloading, and that by reason of such negligence the rail, when hooked, caught in the end of the car, causing the hook to slip from its fastening and fly back with great violence, striking and injuring him, without fault on his part. The defendant admits its corporate capacity, denies plaintiff's claim, and alleges that

*As to what constitutes railroad work within the meaning of such statutes, see note appended to *Keatley v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 1 (Iowa statute); note appended to *Fairman v. Boston & A. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 83 (Massachusetts statute); *Kreuzer v. Great Northern Ry. Co.* (Minn.), 21 Am. & Eng. R. Cas., N. S., 912 (removing wreck); *Canon v. Chicago, M. & St. P. Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 12 (car inspectors).

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by his own negligence he caused or contributed to the injury of which he complains. Upon the trial there was no dispute that plaintiff was employed substantially as above stated, or that he was injured by the recoil of the hook as alleged. There was a dispute, however, as to whose duty it was to attach the hook, and who in fact attached it at the time of the accident, and also as to the matter of signals for moving the car—whether any were given, and, if so, by whom given.

It is not seriously contended that the evidence failed to present a fair question for the jury, and the only errors discussed in argument are assigned upon the instructions given by the court. Among the instructions objected to we note the following:

“Par. 2. Under the issues thus joined, before the plaintiff can recover, he must establish all the material allegations of his petition by a preponderance of the evidence, according to the rules set forth in these instructions.”

“Par. 5. Before the plaintiff can recover, he must establish by a preponderance of the evidence the following propositions: First. That plaintiff was in the employ of the defendant, and that such employment was connected with the use and operation of the defendant's railway at the time of the accident. * * * Fifth. That the plaintiff, in the performance of his duties at the time of the accident, exercised ordinary care and prudence, and did not in any manner contribute to his own injury. If each of the foregoing propositions are established by a preponderance of the evidence, then your verdict should be for plaintiff, and, if the plaintiff has failed to satisfy you by a preponderance of the evidence as to any one of these five propositions, then your verdict should be for the defendant.”

“Par. 11. If you do not find that it was the duty of plaintiff to give the signal to the conductor to start the train, and you find that the plaintiff did not give such signal to the conductor to start the train at the time of the accident, and you find that the plaintiff handed the hook to the employees in the car, and by them hooked in the rail, or you find that plaintiff himself placed the hook in the rail, and you further find that it was the duty of the men in the car to place the rail in a position in the car so that it would pass out of the car unobstructed, and such men in the car failed and neglected to exercise ordinary care and caution in placing such rail, and they were negligent in so doing, and you further find that such employees in the car gave the signal to the conductor to start the train, and such conductor acted on such signal, and gave the signal to engineer to start the train and the train was thereby started, yet it was the duty of the plaintiff to exercise ordinary care and caution; and if the plaintiff, by the exercise of ordinary care, could have observed and ascertained that the rail would not pass out of the car in time to have gotten out of the way of danger, or in time to have

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notified the conductor that the rail would not pass out of the car, and thus have avoided the accident, and the plaintiff failed and neglected to do so, then the plaintiff would be guilty of negligence directly contributing to his own injury. But if you should find from the evidence that such a state of facts existed as stated above in this instruction, and you further find that such person in the car, giving such signal, if any, or other employees in the car, knew that the plaintiff was negligent, and knew that he had not exercised such ordinary care and caution, and knew that the circumstances were such as to indicate a strong probability that the plaintiff or some other person would get hurt, it would be the duty of such person or persons in the car having such knowledge, if any, to do whatever he or they could, with ordinary promptness, to avert the accident, after he or they saw that the plaintiff or other person was in danger of getting hurt; and in such event, if he or they failed to use reasonable means with reasonable promptness to avert the accident, this would be negligence on their part, which would make the defendant liable, even though the plaintiff may have been first negligent as stated in this instruction. But if the circumstances were not such as to suggest immediate danger to any person, or if it was reasonably apparent to such employee or employees that nothing could be done in time to avert the accident, after they discovered such negligence of the plaintiff (if they did discover it) and saw the danger, then, in either event, there would be no negligence of the employee or employees in the car, in not attempting to avert the accident."

After deliberating upon their verdict several hours, the jury returned into court with a written interrogatory as follows: "To the Court: Your instructions are not clear. We all agree that plaintiff and defendant were negligent. Section 5 of your instructions states that if we find plaintiff guilty of negligence we must find a verdict for defendant. Section 11 states that, if plaintiff was guilty of negligence and defendant had time to avert accident, then the plaintiff can recover. Are not these contradictory?" In response to this question the court gave an additional instruction as follows: "Gentlemen of the jury, to your written inquiry in regard to instructions number five and number eleven you are instructed that the fifth proposition embodied in instruction number five is qualified by instruction number eleven, should you find that the facts existed as stated in instruction number eleven." Later, and after still further deliberation, the jury again returned into court, repeating their complaint of inability to reconcile the instructions given in paragraphs 5 and 11 of the charge, and asking still further direction. Thereupon the court repeated in substance its former explanation of these paragraphs, and added the following: "If you find from the evidence the plaintiff himself gave the signal to move the

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train, and in obedience thereto the train was moved, and the plaintiff thereby received the injury of which he complains, then, and in that event, he is responsible for the result of such movement, and he cannot recover in this action."

While there is much in these several paragraphs of which appellant cannot justly complain, we cannot avoid the conclusion that the jury were in some respects misdirected.

1. By the second paragraph of the charge the jury were told that, in order to recover, plaintiff was required to establish "all the material allegations of his petition." This instruction is objectionable for two reasons: It leaves the jury to determine for themselves what allegations of the petition are material, and it imposes upon plaintiff a greater burden than he was required to bear. For instance, the petition, after alleging his injury in the manner we have described, proceeds to aver that in consequence thereof he has been made to undergo great pain and suffering, and to incur expense for medical attendance and nursing; that he is still laboring under the disability thus occasioned, and is liable to sustain further loss and suffering therefrom in the future. Now, these allegations are material, and are not improperly pleaded; but plaintiff is not required to prove the truth of all of them before he can recover. If he establishes the alleged negligence of the defendant, and consequent injury to himself without contributory fault on his own part, then his right of recovery is complete, although the jury may believe he has fully recovered, and there is no probability of future loss, pain, or suffering, or although he fails to show the employment of physician or nurse. The same suggestion may properly be made as to many other allegations of the pleadings, failure to prove which would not necessarily defeat plaintiff's right of recovery. See *Kaline v. Stover*, 88 Iowa, 245, 55 N. W. 346; *Maichen v. Clay*, 62 Iowa, 455, 17 N. W. 658; *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000. The second paragraph of the charge, to which we have just referred, and the first subdivision of the fifth paragraph, are also open to the criticism that they submit to the finding of the jury matters which are conceded, or concerning which there is no controversy in the evidence. That plaintiff "was in the employ of the defendant, and that such employment was connected with the use and operation of the defendant's railway," was not a matter of controversy; and, if the jury had specially found in the negative upon either proposition, the finding must have been set aside, as being manifestly unsupported by the evidence.

2. With further reference to the first clause of the paragraph it may be observed that, to entitle plaintiff to the benefit of Code, § 2071, he was not required to prove his employment to have been connected with the use and operation of the railway. Even though his employment may have had nothing whatever to do with the movement of trains, yet, if

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the performance of his duties brought him into a situation where he was exposed to the perils and hazards arising from such operation or movement, and he was thus injured by the negligence of a co-employee, he is within the protection of the statute. *Pyne v. R. R.*, 54 Iowa, 223, 6 N. W. 281, 37 Am. Rep. 198; *Keatley v. R. R.*, 94 Iowa, 691, 63 N. W. 560; *Jensen v. R. R. (Iowa)* 88 N. W. 952. It was error, therefore, as an abstract proposition of law, to direct the jury that plaintiff could not recover without showing his employment to have been connected with the operation of the road; but, as we hold that his employment was of that character, the error was not of itself prejudicial, and we should not be disposed to reverse upon that ground alone.

3. The eleventh paragraph of the charge attempts to collate the facts and circumstances bearing upon the question of contributory negligence, and to instruct the jury as to their effect upon plaintiff's right of action. In its commendable anxiety to make its resume full and fair, the learned trial court seems to have been betrayed into some obscurity of statement. Indeed, it is hardly possible for any person to construct a sentence of such extreme length and multiplicity of subsidiary clauses having reference to technical matters, and succeed in making it so clear that a jury of nonprofessional men will be able to read and apply it with clear understanding. In the present instance the lack of clear comprehension by the jury was demonstrated by their repeated return into court asking further direction as to the effect of this particular paragraph. In giving such direction, the court, as we have seen, stated an additional proposition to the effect that, if plaintiff himself gave the signal to move the train, and as a result of such movement he was injured, then he was responsible for his own injury, and could not recover. This rule, we think, cannot be the law. It wholly ignores the question of due care for his safety by his co-employees, as well as due care on his own part in giving the signal. The mere fact that he himself gave the signal does not enable the court to say as a matter of law that he was guilty of contributory negligence. Whether it was or was not negligence, and, if negligence, whether it in any manner caused or contributed to the accident, depends entirely upon inferences to be drawn from the attendant circumstances; in other words, it was a question for the jury.

4. Other exceptions are urged to the instructions, but, in view of the conclusions already announced, it is unnecessary for us to further extend this opinion. This court is fully aware of the difficulties and embarrassments which surround trial courts in the preparation of instructions. Under the rule which requires the judge to remain in personal supervision of the trial in all its stages he is forced, if he would avoid delay, to prepare his charge at his desk, subject to constant interruption and distraction; and the chief cause for

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surprise is that so few prejudicial errors are committed. Many of the criticisms offered to the charge now before us are of a verbal or technical character, and we should be disposed to overrule most of them were it not that, taking the record as a whole, it seems very clear the jury became confused, and did not fully comprehend the rules of law laid down by the court. A new trial will therefore be ordered.

The judgment of the district court is reversed.

CHICAGO & E. I. R. CO. v. HEEREY.

(*Supreme Court of Illinois, June 16, 1903.*)

[68 N. E. Rep. 74.]

Appeal—Review—Instructions.

Where no cross-error is assigned by plaintiff (appellee) on the action of the court in instructing that there could be no recovery on certain counts in the petition, the instruction must be regarded as correct.

Injury to Employee—Assumption of Risk—Burden of Proof.*

In an action by an employee for personal injuries, the burden of proving that there was not an assumption of risk is on the plaintiff.

Same—Directing Verdict—Questions for Jury.

In an action for the death of a railroad fireman by the parting of tender and engine, the evidence examined, and *held* that the court did not err in refusing to instruct for defendant, but the question of intestate's knowledge and assumption of risk was for the jury.

Same—Assumption of Risk—Instruction.

In an action for the death of a railway fireman by the parting of tender and engine, an instruction that "if the deceased knew, or by the exercise of ordinary care might have known, that the chains were uncoupled, he would be charged with assuming the risk or dangers arising therefrom, if an ordinarily prudent person, acting with ordinary care and prudence for his own safety, would not have continued in the same work; but if an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the work, the deceased did not necessarily assume the risk"—was erroneous, as eliminating assumption of risk from knowledge of danger, and introducing the test of contributory negligence.

Appeal from Appellate Court, First District.

Action by C. J. Heerey, as administrator, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 647) affirming a judgment for plaintiff, defendant appeals. Reversed.

Pam, Calhoun & Glennon (W. H. Lyford, of counsel), for appellant.

James C. McShane, for appellee.

CARTWRIGHT, J. Joseph Heerey, a fireman on one of

*As to the burden of proving assumption of risk by a railroad employee, see note, 11 Am. & Eng. R. Cas., N. S., 489 (burden of proving servant's knowledge of defect); *Burnham v. Concord & M. R. R.* (N. H.), 16 Am. & Eng. R. Cas., N. S., 320.

appellant's engines, was killed on the evening of October 21, 1898, near Kensington, Ill., by the parting of the engine and tender as he was standing with one foot on each, shoveling coal into the fire. He fell between the engine and tender, and was run over by the latter and killed. Appellee, as administrator of his estate, brought this suit in the superior court of Cook county to recover damages for his death, and obtained a judgment, which was affirmed by the Branch Appellate Court for the First District.

At the conclusion of the evidence the defendant asked the court to direct a verdict in its favor. The court refused to do so, and the refusal is assigned as error.

The engine was used to haul a regular train and to do switching work between Oakdale and Thornton, and was taken to defendant's roundhouse in Chicago once a week. On the Saturday night before the accident it was taken to the roundhouse as usual, and was taken out on Monday morning. It was provided with safety chains, one on each side of the drawbar, to prevent the engine and tender from pulling apart in case the drawbar or coupling pin should break. The engine and tender were coupled together with the drawbar and coupling pin, and the safety chains were permanently attached to the tender, to be hooked to the engine. If the coupling was all right, the chains would be slack, but were provided to draw the tender in case the coupling or drawbar should break. When the engine went out from the roundhouse on Monday morning the safety chains were unfastened and hanging from the tender, and the roundhouse foreman and engineer tried to couple them, but found them a trifle too short. Afterward, during the week, the engineer made various attempts to couple the chains, but was unable to do so. It was in use in that condition until the accident, on Thursday evening; and on the morning of that day the deceased, who had been in the defendant's employ as an extra fireman for about three months, was sent out to fire the engine. On the return trip, hauling a train, the deceased was standing with one foot on the engine and the other upon the tender, when the coupling pin broke, and, the safety chains being uncoupled, the engine and tender parted, and the accident resulted.

The amended declaration contained six counts, but the court instructed the jury that plaintiff could not recover, upon the evidence, under either the second, fourth, fifth, or sixth count. The issues under the first and third counts were submitted to the jury. The counts withdrawn from the jury charged the defendant with negligence respecting the drawbar or coupling pin, causing the pin to break. There was no verdict upon those counts, and the questions arising upon the record relate only to the first and third counts, upon which the verdict and judgment were wholly based. They charged that the safety chains provided to hold the engine and tender

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together in case the coupling apparatus should give way were unfastened and disconnected; that defendant was negligent in that respect, and as a result the engine and tender parted, causing the accident. There is no cross-error assigned on the action of the court in instructing the jury that plaintiff could not recover under the second, fourth, fifth, or sixth count of the amended declaration, and the instruction must be regarded as correct, and not subject to review. The question is whether the court ought to have given the peremptory instruction as to the first and third counts.

The ground for insisting that the court ought to have directed a verdict for the defendant is that the evidence proved, as a matter of law, that the deceased assumed the risk of the chains being disconnected. It is contended that the burden of proof was upon the plaintiff to show that deceased was ignorant of the fact that the chains were uncoupled, and that he failed to prove such fact, but, on the contrary, the evidence showed that deceased was well aware of their condition, and entered upon and continued in the employment without objection. It is the settled law that the servant, when he engages in the employment, does so in view of the risks incident to it; that he will be presumed to have contracted with reference to such risks and assumed the same; and that, if he receives an injury resulting from the incidental risks and hazards ordinarily connected with the employment, he cannot hold the master responsible. Cooley on Torts, 521; 20 Am. & Eng. Ency. of Law (2d Ed.) 109. The rule also applies in any case where the servant during the course of his employment becomes aware of a defect, but voluntarily continues in the employment without objection. Following the universal rule, this court has stated the principle in numerous cases, among which are the following: In *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, it was said: "The doctrine upon this subject appears to be that an employee cannot recover for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, after he had knowledge of the defect and continued his work." Again, it was said in *Simmons v. Chicago & Tomah Railroad Co.*, 110 Ill. 340: "If a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury." In *Chicago & Eastern Illinois Railroad Co. v. Geary*, 110 Ill. 383, the court said: "The rule is as contended by counsel for appellant, namely, when an employee, after having the opportunity to become acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. One may, if he chooses, contract to take the risks of

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a known danger. Presumptively, he charges in such cases in proportion to the risk, or, rather, for the risk." In *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944, it was said: "That, as between employer and employee, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after his employment, he knows of the defect, but voluntarily continues in the employment without objection, are familiar rules of law, often recognized by the decisions of this and other courts." In *Chicago Drop Forge & Foundry Co. v. Van Dam*, 149 Ill. 337, 36 N. E. 1024, the court said: "As a general rule, the servant will be regarded as voluntarily incurring the risk resulting from the use of defective machinery, if its defects are as well known to him as to the master." In *East St. Louis Ice & Cold Storage Co. v. Crow*, 155 Ill. 74, 39 N. E. 589, it was said: "If the injury was the result of obvious defects in the barge where he was working, or from causes known to him, or which he might have known in the exercise of due care, he cannot recover." In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, it was said: "An employee assumes the risks of known dangers, and such as are so obvious that knowledge of their existence is fairly to be presumed." In *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416, it was again said: "It is well understood that, as between employer and employee, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after the employment, he knows of the defect, but voluntarily continues in the employment without objection."

It is also the rule that an employee of sufficient age and experience is chargeable with knowledge of the ordinary conditions under which the business is conducted, and its ordinary risks and hazards, and will be presumed to have notice of and to have assumed all such risks and hazards which to a person of his experience and understanding are, or ought to be, patent and obvious. If a defect is so plain and obvious to the senses that in the exercise of ordinary care the employee would discover it, and he continues in the employment without complaint, and without any assurance by the master that the defect will be repaired or the danger removed, he assumes the risk arising from it. *Indianapolis, Bloomington & Western Railroad Co. v. Flanigan*, 77 Ill. 365; *Swift & Co. v. Rutkowski*, 167 Ill. 156, 47 N. E. 362; *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815. The employee, however, has no duty of inspection to examine for and discover latent defects and dangers which arise during the course of his employment, rendering it more than

ordinarily hazardous. He is charged with notice of such defects in appliances as the exercise of ordinary care would make manifest to him; but he does not assume the risk of defects of which he has no knowledge, and which he cannot discover by the use of ordinary care, and of which the master has, or ought to have, knowledge. He has a right to assume that the master has discharged his duty in using reasonable care to furnish him with reasonably safe machinery and appliances, but he cannot assume such fact against his own knowledge of dangerous or defective machinery. The rule is also subject to the limitation that the employee must understand not only the existence of a defect, but must be chargeable with knowledge that the defect exposes him to danger. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Union Show Case Co. v. Blindauer*, 175 Ill. 325, 51 N. E. 709. But where the danger arising from the defect would be obvious to a person of ordinary intelligence, the law will charge him with knowledge of the danger.

The question on whom rests the burden of proof as to the knowledge of deceased concerning the uncoupled condition of the safety chains is the subject of argument by counsel. On the one hand, it is urged that the burden of proof was on the plaintiff to show that the deceased did not know that the chains were uncoupled, and that the defendant had knowledge of the defect; and, on the other hand, it is contended that the burden was on the defendant to prove the opposite. There is some conflict of authority concerning the burden of proof in such cases. But it is said in 1 *Thompson on Negligence* (section 368) that in those jurisdictions where the burden rests on the plaintiff to prove his own freedom, or the freedom of the person killed or injured, from contributory negligence, the rule, by analogy, is that the burden will rest upon the employee of proving that he did not assume the risk of the employment, and the want of knowledge of the danger must be averred and proved. In actions for personal injuries it has always been held in this state that the plaintiff must allege and prove that he was free from contributory negligence causing the injury, and the same rule has been adhered to respecting the assumption of risk. In *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95, it was held that the burden of proof was upon the servant to establish the three propositions that the appliance was defective; that the master had notice thereof, or knowledge, or ought to have had; and that the servant did not know of the defect, and had not equal means of knowing with the master. The third proposition, of course, relates only to patent defects, and does not embrace the duty of inspection to discover latent dangers and defects. The rule has been followed in *Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051; *Chicago & Alton Railroad Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38;

Howe v. Medaris, 183 Ill. 288, 55 N. E. 724; and other cases. In 3 Elliott on Railroads (section 1311) the author says that he thinks the rule adopted by this court is the correct one, since the employee takes the risk of defects of which he has notice, and, in order to constitute a cause of action, it is necessary to show that the defect is one for which the employer is responsible, while for defects known to the employee he is not responsible. It is true that, where the fact is not susceptible of direct proof, it may be inferred from the circumstances, and the plaintiff may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. But that does not affect the question where the burden of proof rests. In a case where a person is killed, and there are no eyewitnesses to the accident, there is no dispute that the burden of proof rests on the plaintiff to show due care on the part of the deceased; but if there are no eyewitnesses, and no direct proof, he is entitled to the benefit of the presumption. Knowledge or want of knowledge of a defect may be inferred from proof of the circumstances. In this case the engineer gave testimony tending to prove that deceased knew the safety chains were not coupled, and that he assisted the witness in attempting to couple them, but there was evidence tending to show that the engineer made contradictory statements out of court respecting the knowledge of the deceased on that question. The space between the engine and tender was covered by a sheet-iron apron, and the duties of the deceased were performed in the gangway. He was not charged with the duty of inspecting the engine to discover whether there were any defects not obvious, and, under all the evidence, the court could not say, as a matter of law, that the deceased knew, or by the exercise of ordinary care ought to have known, that the chains were disconnected, and that a person of ordinary prudence would have understood that running the engine without coupling them rendered the employment dangerous. Those were questions proper to be submitted to the jury in the first instance, subject to the judgment of the trial court and Appellate Court as to whether their verdict was against the weight of the evidence. We think there was no error in refusing to give the instruction directing a verdict.

The defendant was entitled, however, to have the question whether the risk was assumed by the plaintiff, either as an incident to his employment generally, or as arising from a defect of which he had knowledge, submitted to the jury upon correct instructions as to the law. The only instruction given to the jury on the question of the assumption of risk was the second given at the request of plaintiff, as follows: "The court instructs the jury that if you believe from the evidence that the safety chains on the engine in question were uncoupled before and at the time of the injury, and that as a result thereof the

engine was not ordinarily safe for the deceased to work upon, and that its said condition was unusual, and was the direct result of the defendant's negligence, if any, as charged in the first and third counts, or either of them, in the declaration, then you are instructed that the deceased did not assume the risk or dangers, if any, arising from the chains being uncoupled, unless you believe from the evidence that he knew, or by the exercise of ordinary care might have known, that said chains were uncoupled, in time to have avoided the injury which resulted in his death. But you are further instructed that if you believe from the evidence that he did know, or by the exercise of ordinary care might have known, that the chains were uncoupled, then the rule of law as to the effect of such knowledge or means of knowledge upon his part is that if, under all facts and circumstances shown in evidence, an ordinarily careful or prudent servant, acting with ordinary care and prudence for his own safety, would not, under similar conditions, have continued the same work that the deceased was performing under the same risk or dangers, then the deceased must be charged with assuming said risk or dangers, if any; but, upon the other hand, if, under all the facts and circumstances shown in evidence, an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the same work under the same risk or dangers, then the deceased did not necessarily assume said risk or dangers, if any. Whether he did or did not assume said risk or dangers, if any, is a question for the jury to determine under all the evidence and the rule of law above stated." The first part of the instruction was correct. As a matter of law, the employee does not assume risks arising from the negligence of the master, unless he is chargeable with knowledge of the fact of such negligence, and of the defect or risk. The second part of the instruction advised the jury that if the deceased knew, or by the exercise of ordinary care might have known, that the chains were uncoupled, he would be charged with assuming the risk or dangers arising therefrom, if an ordinarily careful and prudent person, acting with ordinary care and prudence for his own safety, would not have continued in the same work; but if an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the work, the deceased did not necessarily assume the risk. It made the test of plaintiff's right to recover the negligence or want of negligence of the deceased, and told the jury that whether he did or did not assume the risk was to be determined under that rule of law. It took from the jury all questions of the assumption of risk on account of the knowledge of the danger, and continuing in the service without objection. Contributory negligence and assumption of risk are entirely different things, in the law. Although the two.

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questions may both arise under the facts of a case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may be involved in every case; but an employee may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger, and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover. *Miner v. Connecticut River Railroad Co.*, 153 Mass. 398, 26 N. E. 994; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Louisville & Nashville Railroad Co. v. Orr*, 84 Ind. 50; *Bodie v. Charleston & W. C. Railway Co.*, 61 S. C. 468, 39 S. E. 715; *Cunningham v. Bath Ironworks*, 92 Me. 501, 43 Atl. 106; *Carbine's Adm'r v. Bennington & Rutland Railway Co.*, 61 Vt. 348, 17 Atl. 491; *St. Louis, Iron Mountain & Southern Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895, 26 Am. St. Rep. 48; *Texas & Pacific Railway Co. v. Bryant*, 8 Tex. Civ. App. 134, 27 S. W. 825; *Bagley's Master's Liability for Injuries to Servants*, 197; *Bailey's Personal Injuries*, § 938. Some occupations are attended with great danger, and the use of certain instrumentalities is so dangerous that no degree of care will protect the employee in all cases; but if he voluntarily undertakes to do work ordinarily attended with perils, although he uses all the care he is capable of, he assumes the risk. He is defeated, not because of his negligence in such a case, but because by his contract, or by continuing in the service without objection, he has assumed the risk of injury. 3 *Elliott on Railroads*, supra; *Swift & Co. v. Rutkowski*, supra. In *Herdman-Harrison Milling Co. v. Spehr*, supra, it was held that if the plaintiff had been an adult he would have assumed the risk of the employment, and the court said: "The requirement in the instruction that he must have used reasonable care and prudence, 'considering his age and experience,' has no reference to the risk or hazards of his employment."

There are many limitations of the doctrine of assumed risk, such as the duty of the master to disclose to the employee latent defects and dangers, and to instruct a servant that is ignorant, inexperienced, or incapable, from want of maturity or otherwise, to understand and appreciate the nature and extent of dangers to which he is exposed. So, also, a risk from a defect is not assumed by the servant where he calls the attention of the master to it, and is assured that it will be repaired, and he may remain in the service for a reasonable time under that assurance. There are other cases where, by the order of the master, or one standing in that relation, the servant is directed to encounter a danger, and, his duty being that of obedience, he does not assume the risk. In the case of a promise to repair, or of a command, and per-

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haps some other cases, the question is one of contributory negligence on the part of the servant, depending upon whether the danger was so great that an ordinarily prudent person would not have encountered it. *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *West Chicago Street Railroad Co. v. Dwyer*, 162 Ill. 482, 44 N. E. 815; *Chicago Edison Co. v. Moren*, 185 Ill. 571, 57 N. E. 773; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669. In those cases the question of assumed risk, which is founded in contract, is removed by the promise to repair, the coercion, or other sufficient cause, but the question of contributory negligence involved in every case still remains. The employee must always exercise the degree of care which an ordinarily prudent person would have exercised under the same circumstances, but he does not assume the risk resulting from a direct command. *Dallemand v. Saalfeldt*, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214, *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 E. 651, *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831, and *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, are cases of that character. In *Chicago & Alton Railroad Co. v. House*, 172 Ill. 601, 50 N. E. 151, the employee had no knowledge that the switch was open. The defendant was in fault in taking away a light which had been kept on the switch, and the claim that the risk was assumed rested only on the mere possibility that sometime an employee might leave a switch open, and the fireman might thereby be killed. The decision in that case is not an authority for the proposition that assumption of risk rests upon contributory negligence. All the cases relied upon by counsel for plaintiff come within some well-recognized exceptions to the rules concerning assumed risks. In this case there was no question of immaturity of the employee, promise to repair, assurance of safety, or coercion, and the question of the assumption of the risk was fairly presented by the evidence. We think it apparent that the question was not correctly submitted to the jury by the instruction, and that it confused the doctrine of assumption of risks with contributory negligence. There was no instruction which correctly stated the risk assumed by a servant who remains in the master's employ without complaint, knowing of the existence of defective appliances. The rule on that subject has nothing whatever to do with care, or want of care, either of the servant or of the master.

In answer to the objections to the instruction, it is claimed that the instruction is not inconsistent with the assumption of risk being treated as a matter of contract, that the instruction did not negative that proposition, and that the inference to be drawn from it is that remaining at work, under the circumstances, almost charged the deceased with assuming the

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risk, but not necessarily so. We do not think the jury would understand the instruction in that way, and the objection would not be obviated if they should.

The judgments of the Appellate Court and superior court are reversed, and the cause is remanded to the superior court. Reversed and remanded.

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(*Supreme Court of Indiana, Oct. 9, 1903.*)

[68 N. E. Rep. 262.]

Exceptions.

Where defendant reserves a general exception to the overruling of his demurrer to a complaint having several paragraphs, he cannot question severally the ruling as to each paragraph.

Employers' Liability Act—Application of.

At an interval when there happened to be nothing for plaintiff to do in the construction of a railroad bridge on which he was employed, and while he was sitting down, he was injured by a stone raised by a derrick being swung against him by reason of the person in charge negligently ordering the stone raised while a train was passing which struck the derrick or chain: *held*, that Employers' Liability Act, § 1, subd. 2 (Burns' Rev. St. 1901, § 7083), declaring a railroad company liable for injury to a servant resulting from the negligence of any person in the service of such corporation to whose order the injured employee was bound to conform and did conform, did not apply.

Injury to Employee—Fellow Servants—Foreman.*

The person in charge being merely a workman like plaintiff and others engaged thereon, in the giving of the general order to raise the stone he was acting as a foreman, and not as a vice principal.

*As to whether a foreman is a fellow servant of a hand working under him, see *Illinois Cent. R. Co. v. Atwell* (Ill.), 6 R. R. R. 317, 29 Am. & Eng. R. Cas., N. S., 317; *Haworth v. Kansas City Southern Ry. Co.* (Mo.), 3 R. R. R. 235, 26 Am. Eng. R. & Cas., N. S., 235; *Missouri, K. & T. Ry. Co. of Texas v. Walden* (Tex.), 2 R. R. R. 294, 25 Am. & Eng. R. Cas., N. S., 294; *Thacker v. Chicago I. & L. Ry. Co.* (Ind.), 4 R. R. R. 772, 27 Am. & Eng. R. Cas., N. S., 772, notes, 6 Am. & Eng. R. Cas., N. S., 600 (section boss and hands under him); *Goodwell v. Montana Cent. Ry. Co.* (Mont.), 4 Am. & Eng. R. Cas., N. S., 419; *Illinois Cent. Ry. Co. v. Bolton* (Tenn.), 9 Am. & Eng. R. Cas., N. S., 868; *Northern Pac. R. Co. v. Charles* (U. S.), 4 Am. & Eng. R. Cas., N. S., 128; *Northern Pac. R. Co. v. Peterson* (U. S.), 4 Am. & Eng. R. Cas., N. S., 117; *Southern Ry. Co. v. Manzy* (Va.), 20 Am. & Eng. R. Cas., N. S., 647; *Kerner v. Baltimore & O. S. W. Ry. Co.* (Ind.), 9 Am. & Eng. R. Cas., N. S., 328; *Thompson v. Chicago & E. R. Co.* (Ind.), 6 Am. & Eng. R. Cas., N. S., 611; *O'Neill v. Great Northern Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 415 (roadmaster and laborer working together); *Martin v. Atchison, T. & S. F. R. Co.* (U. S.), 6 Am. & Eng. R. Cas., N. S., 600; *Union Pac. Ry. Co. v. Doyle* (Neb.), 7 Am. & Eng. R. Cas., N. S., 774; *Gavigan v. Lake Shore, etc., R. Co.* (Mich.), 5 Am. & Eng. R. Cas., N. S., 523; *Flippen v. Kimball* (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 256; *Bryan v. Southern Ry. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 542; *Bradley v. Chicago, M. & St. P. Ry. Co.* (Mo.), 8 Am. & Eng. R. Cas., N. S., 728; *Knot v. Southern Ry. Co.* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 684; *Illinois Cent. R. Co. v. Josey* (Ky.), 20 Am. & Eng. R. Cas., N. S., 869.

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Same—Same—Same—Assumption of Risk.

Risk of injury from negligence of a foreman was an assumed risk, in the absence of negligence by the master in selecting him for such position.

Same—Safe Place to Work—Duty of Master.

Where plaintiff was engaged with others in the general work of constructing a bridge, and chose his own position while a portion of the work was going on, it was not the master's duty to have a representative present to see that such place was safe.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

Action by Jackson H. Harrell against the Southern Indiana Railway Company. From a judgment of the Appellate Court (66 N. E. 1016) affirming a judgment for plaintiff, defendant appeals. Reversed.

F. M. Trissal, Brooks & Brooks, and Emerson Short, for appellant.

East & East and McHenry Owen, for appellee.

GILLET, J. This was an action for an injury to the person of appellee. He recovered in the court below, and the judgment was affirmed by the Second Division of the Appellate Court. Appellant appeals to this court under the third subdivision of section 1337j, Burns' Rev. St. 1901, and assigns as error here that said division erred in affirming the judgment of the trial court. We proceed to a consideration of such assignments of error in the Appellate Court as were not subsequently waived.

There were seven paragraphs of complaint, and appellant demurred to each of them. Its demurrer was overruled, and it reserved a general exception to the ruling. Although appellant sought on appeal to question severally said ruling as to each of said paragraphs, yet, as the exception was in gross, we are compelled to hold that such assignments of error present no question for our consideration. *Noonan v. Bell*, 159 Ind. 329, 64 N. E. 909, and cases there cited.

Appellant further assigned as error that the Greene circuit court erred in overruling its motion for a new trial. Among other grounds for a new trial, appellant assigned in said motion that the verdict was contrary to the evidence, and, further, that the verdict was contrary to law.

The evidence showed the following state of facts: On July 5, 1899, appellant, a railroad corporation, was engaged in the construction of a railroad bridge over White river, in the county of Greene. A temporary work or bridge had been built over the river, on which a track had been laid. A stone pier was being built under the structure, and a number of men, including appellee, were engaged in its construction, under one John Gratzner. The necessary stone were unloaded from cars, and were placed in position by means of a derrick, which was erected upon a platform a few feet north of the track. The derrick's mast was so stayed as to give the top a

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slight inclination toward the south, with the result that in handling a heavy stone it had a tendency to swing toward the pier and track. There was evidence that the derrick was purposely so constructed, with a view to its greater utility; but whether it can be said to have been defective or not, by reason of being so constructed, it appears that appellee, whose principal business was to arrange the tackle about the stone and lower it from the cars, knew of such tendency, and had helped to hold a rope in keeping the boom and suspended stone from swinging over the track. There had never been an attempt to handle a stone when the portion of the track that was adjacent was occupied by a moving locomotive or cars. Near the close of working hours on the day in question a locomotive and two or three flat cars stood near the east end of said temporary bridge. A heavy stone, which had just been unloaded from one of said flat cars, lay upon the pier, occupying its intended place in the top course. A short distance to the west there were several flat cars, and still further on, and near the west end of the bridge, were a portable pile driver and its car. Appellee, who testified that there was nothing for him to do at that time, was seated upon a projecting bent. He had not received a command as to what place he should occupy. The conductor of the train said to Gratzner, "John, are you going in with us?" The latter answered that he and his men were going to set the stone and return on a hand car. After about two minutes, occupied by the men in charge of the train in coupling the flat cars and the pile driver and its car together, the train, as thus made up, started east, and, before the pile driver reached the pier, the train was moving at a speed of from three to six miles an hour. In the meantime Gratzner ordered one of the men to signal the stationary engineer to raise the stone a little, it being necessary to make a mortar bed under it. The signal was given, and the stone was raised about two feet before the pile driver had passed. Three men, Courtney, Clemmons, and Polland, were holding the stone away from the track, by means of a rope, after the stone was raised above the course in which it had rested. Clemmons and Polland let go of the rope, Clemmons going to get his trowel and Polland going to get mortar. Courtney was thus left to hold the stone alone, and, as it proved too heavy for him, he abandoned the rope, and sought a place of safety. The boom then swung around, and the chain which held the suspended stone caught on the running board of the pile driver. This caused the stone to swing east, and as it swung back it struck appellee, crushing one of his feet and injuring the other. It seems to have been but a brief interval after the stone swung clear until the chain caught on the running board, as a number of appellee's witnesses in effect testified. Appellee's witness Helms, who was on the third or fourth car east of the pile driver, testified that the stone was not suspended as he passed

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the derrick, and that he was looking to see that all fall lines were clear. Gratzner had exclusive charge of the stonework. He directed the men and worked himself.

The various paragraphs of complaint rest on various theories. Negligence is charged against appellant in the construction of the derrick, and also against Gratzner and the conductor and the engineer severally. There is no charge that appellant did not exercise due care in the selection of said employees. Appellee's counsel say of the complaint: "The first five paragraphs minutely describe all the conditions and concurring causes of the injury. The sixth paragraph is intended to be pleaded under the second subdivision of section 1 of the employers' liability act. The seventh paragraph charges negligence against the engineer of the train and the conductor, and also against Gratzner, charging them all as vice principals under the fourth subdivision of the act." There was not a scintilla of evidence supporting the theory that either the conductor or the engineer was negligent. Neither of them is shown to have known that the stone was suspended or to have had any reason to apprehend that it was. The manner in which the derrick was constructed does not appear to have been the proximate cause of the accident. The derrick possessed a particular utility when constructed as it was, and it was ordinarily safe so long as it was used in accordance with the established custom that the evidence shows had before obtained. It was a master's duty to have the derrick properly constructed and maintained, but appellant was not bound to apprehend that its servant might put the same to a negligent use—a use wholly contrary to the custom that had obtained before the accident. See, on the subject of proximate cause, *Enochs v. Pittsburgh, etc., R. Co.*, 145 Ind. 635, 44 N. E. 658; 1 Thompson, Commentaries Law of Neg. § 43 et seq.

This brings us to the question as to whether appellant was responsible for the negligence of Gratzner, assuming that he, as well as Clemmons and Polland, was guilty of negligence. As to the Employers' Liability Act (section 7083 et seq., Burns' Rev. St. 1901), it is evident that appellant is not liable under the second subdivision of the first section. That subdivision was not intended to create a liability based on an order or direction, where such order or direction was as broad as the whole service, and where the injured servant, without the compulsion of an order or direction from one whose order or direction he was required to obey, was at the time governing himself according to his own judgment as to what was proper. In so far as the fourth subdivision of said section is concerned, it does not appear that Gratzner belonged to any of the classes of servants particularly mentioned therein. The latter part of said subdivision is not any broader than the common law upon the subject; so we may as well consider the remaining question as to liability from that standpoint.

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Assuming that Gratzner was negligent, as we have before done, it would follow that appellant might have been liable to a stranger, under the rule of respondeat superior, had he been in appellee's place. But in appellee's case negligence could not be predicated on his injury if it was a result of one of the risks of the service, because as to those risks which the servant assumes there is no duty. *American Rolling Mill Co. v. Hullinger* (at last term) 67 N. E. 986; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537.

When the contract of service is entered into the master impliedly contracts that he will exercise ordinary care in the selection and retention of the employee's co-servants, and such employee impliedly contracts that, this requirement complied with, he will assume, as one of the risks of the service, the perils of injury from the negligence of such co-servants. If appellee has made out a case, it must appear that in giving the order to raise the stone Gratzner was acting as a vice principal, and not as a mere fellow servant. The controlling consideration in determining whether an employee is a vice principal is, not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them. *Indiana Car Co. v. Parker*, 100 Ind. 181; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486, 45 N. E. 655; *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; and see further monographic note, *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 1. One of the leading duties of a master, except in instances when it can be said that the complaining servant has assumed the particular risk, is to use ordinary care to keep the place where such servant is employed in as safe a condition as the nature of the employment fairly admits of. To make the above statement certain requires a consideration of the meaning of the word "place." If by this it is meant that the master, by himself or representative, must be always present to ward off every transient peril that may menace the servant in the particular spot or place that he may chance to occupy while engaged in the performance of his work, then it must be affirmed that the rule of law devolves upon the master a duty that in many instances it would be wholly impracticable to discharge. A railroad company could scarcely employ vice principals enough to make it sufficiently argus-eyed to guard its servants to that extent. Furthermore, it is to be observed that in some lines of business, like the operation of a railroad, many servants are employed whose respective duties are so correlated that in the very forwarding of the master's business they are protecting the lives and limbs of their co-servants; and if some limitation be not put upon the word "place," as

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respects transient dangers in the conducting of the details of the business, then every one of such servants becomes, for some purposes, a vice principal, and the integrity of the co-servant rule is destroyed.

In *Fraser v. Red River Lumber Co.*, 45 Minn: 235, 47 N. W. 785, it was said: "While we have no disposition to impinge upon the just and salutary rule that makes it the primary duty of the master to furnish to his servants safe instrumentalities and places for work, yet we are satisfied that in many cases the courts, by indulging in too much refined and artificial reasoning, have carried the rule altogether too far, and have often held the master liable in cases where the untutored minds of laymen, in the exercise merely of common sense, would unhesitatingly say that the master had not been derelict in the performance of any duty towards his servants. When it is considered that, where numerous employees are all engaged in prosecuting the same general object, there is hardly one of them whose duties do not, in part at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically abrogate the whole doctrine of 'common employment.' We shall not attempt to do what no court has yet been able to do, viz., to formulate a statement of the rule that will furnish a test by which to determine every case; but we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, as it is well settled by our decisions, the master is not liable."

In *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, Parker, C. J., observes that, "under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts, before this, have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the negligence of a competent co-employee."

As was said in the decision of *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017: "A place, in its broad sense, is never safe in which an accident happens, and an accident always happens in some place, and so the master might almost become an insurer."

In line with the above observations are the following expressions from the decision of *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853: "The word 'place,' in my judgment, means the premises where the work is being done, and

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does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care." To the same effect, see *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Cleveland, etc., R. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344.

"The test of liability," said the court in *Sofield v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417: "is not the safety of the place or appliance at the instant of injury, but the character of the duty the negligent performance of which caused the injury." In the case of *The Queen* (D. C.) 40 Fed. 694, we find the following language: "It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners owe no duty to the officers or seamen to see it properly performed."

In the endeavor to so correlate the deep-rooted doctrines relative to the master's duty to his servant and the servant's assumption of risk with respect to his co-employees as to maintain such doctrines in a proper relation, we find it stated by the courts that the master is not liable to his servant for the negligence of his co-servants in respect to the details of the work (*Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Southern Indiana R. Co. v. Martin* [Ind. Sup.] 66 N. E. 886; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Geoghegan v. Atlas S. S. Co.* [Com. Pl.] 22 N. Y. Supp. 749); that he is not bound to protect his servant against the mere transitory perils that the execution of the work occasions (*Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518); and that he is not liable merely because a co-servant negligently handles appliances in such a way as to occasion injury to an employee (*Howard v. Denver, etc., R. Co.* [C. C.] 26 Fed. 837; *St. Louis, etc., R. Co. v.*

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Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; Snow v. Housatonic R. Co., 8 Allen, 441, 85 Am. Dec. 720; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Baron v. Detroit, etc., Nav. Co., 91 Mich. 585, 52 N. W. 22).

In *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 52 N. E. 393, it was said: "That appellee did not owe to appellant, as its employee, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives, in the manner as Huey was doing just previous to the accident, is certainly evident. If it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was would, in legal contemplation, be required to be present at all times at its factory when lumber, timber, or iron, or other heavy material of like character, was being handled or moved by some of its employees, and by the hands of such agents or representatives prevent such iron, timber, or lumber, or other material connected therewith, from slipping or falling upon said employees, and thereby injuring them."

It has been said that the boundary line between the act of the master and the act of an employee is sometimes quite vague and shadowy. *Vitto v. Farley* (Sup.) 44 N. Y. Supp. 1; *Hankins v. New York, etc., R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. We realize, as was in effect stated in *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026, that the duty of the master is a continuing one, and that until the agent selected by the master acts up to the limit of the duty of the master to act the master's duty is not done. We further realize that any one of many circumstances may become the governing principle with regard to the extent of the master's duty, but after all we think that there is but one test by which the master's liability to a servant in such cases is to be determined, and that is the one already suggested—was it a master's duty that was neglected?

Granting that for some purposes the man Gratzner was a vice principal, we are unable to perceive that he was acting in that capacity at the time that he gave the alleged negligent order. The risk of injury from the negligence of a foreman is as much within the servant's assumption as is the risk that he may be injured by the act of any other co-servant. *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21, 48 N. E. 364; *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324. An employee of the master may act in a dual capacity—as his representative and as his servant. *Southern Indiana R. Co. v. Martin*, supra; *Kerner v. Baltimore, etc., R. Co.*, supra; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Cumberland, etc., R. Co. v. State*, 44 Md. 283. The evidence in this case shows that

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Gratzer took part in the physical work of setting stone in the construction of the pier, and he was working as a servant when he gave the order looking to the setting of the stone which injured appellee.

To sum up the question as to the claim of a common-law liability: The appellant was not bound to have a representative present at every moment to keep the place that appellee might chance to occupy safe, as against the possible negligence of a co-employee. The man Gratzer was engaged at the time of his alleged negligence as a servant in forwarding the work. Appellee and Gratzer were co-servants, and, as it is not alleged or proved that appellant did not exercise due care in the selection and retention of such foreman, it follows that appellant is not liable for his negligence in the particular instance.

The judgments of the Greene circuit court and of the Appellate Court are reversed, and the former court is directed to award appellant a new trial.

STREET'S EX'X v. NORFOLK & W. RY. CO.

(*Supreme Court of Appeals of Virginia, Sept. 10, 1903.*)

[45 S. E. Rep. 284.]

Injury to Employee—Contributory Negligence.

One engaged in moving cars of coal to be unloaded, moving them one by one, by placing a crowbar on the rail under the wheel, is guilty of contributory negligence, it being the custom, and he being repeatedly warned, to stand at the side of the rail, and he having got astride of it, and been struck by cars moved up behind him by an engine bringing in other cars.

Appeal from Law and Chancery Court of the City of Norfolk.

Action by the executrix of William Street, deceased, against the Norfolk & Western Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

CARDWELL, J. This action was brought in the court of law and chancery for the city of Norfolk to recover damages for the death of William Street, the son and intestate of plaintiff in error, alleged to have been occasioned by the negligence of the defendant in error.

The defendant in error pleaded "not guilty," and after the testimony was closed demurred to the evidence. Thereupon the jury returned a verdict for the plaintiff, subject to the opinion of the court on the demurrer to the evidence, and assessed her damages at \$5,000. The court sustained the demurrer, and rendered judgment for the defendant, and this judgment we are asked to review and reverse.

It appears that the defendant in error was the owner and operator of a trunk-line railway for the transportation of passengers and freight, with a termini for the delivery of pas-

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sengers and freight generally at Norfolk City; and was also the owner of the piers at Lambert's Point, near the city of Norfolk, upon which the deceased, William Street, was at work, at the time of the accident to him, in the employ of one John Twohy, an independent contractor with the defendant in error for the unloading of cars of coal from the piers into the vessels lying beside the piers. The piers extend into Elizabeth river, and are elevated above the surface of the water. The approach by which cars were brought upon the piers was a single track running from the yard of the defendant in error, which was near by. The approach from the yard to the pier was necessarily a steep grade, meeting the piers at the closed end of the "V" formed by the connection of the tracks on the two piers at the upper end of the approach, where there is a switch from which one track runs onto Pier No. 1 (the north pier) and the other track running onto Pier No. 2 (the south pier). Near the beginning of each pier there is likewise a switch, and the track upon the piers divides, so that there are two tracks upon each pier.

The deceased was about 21 years of age, and had been engaged in unloading cars on these piers about 3 or 4 weeks. On the night of the accident, by which he lost his life he was working in a gang of 12 or 13 men, of which one Amos Ballard was the foreman or leader. They were all employees of Twohy, the independent contractor. Seven cars loaded with coal were standing coupled together on track No. 2 of Pier No. 1. Street, Ballard, and Butts were the members of the gang whose duties were to move each one of these cars to the place on the pier where the coal was unloaded through a pocket or chute onto the vessels by other members of the gang. They had moved down two cars, and had come back for the third. Butts had gotten upon the car and had taken off the brake. Ballard stood on one side and Street on the other, and these two, with pinch bars, were pinching the car so as to move it over the pocket or chute connected with the vessel onto which the coal was to be loaded. "Pinching" is the placing of a crowbar on the iron rail under the wheel of the car and prizing it along until the car has acquired sufficient momentum to take it down a slight grade. Street and Ballard had moved the car about two feet from the remaining cars, and Street was standing between the cars, and straddling the rail, with his pinch bar against his stomach. Just then another cut of cars was pushed up onto Pier No. 1 from the yard by a locomotive, and this cut of cars was shoved against the four cars standing on the track, and, as was the custom, coupled with them. When the cars struck and coupled together, the "slack" ran out of the four cars, and the rear car, moving up two or three feet, struck Street, who was, as stated, standing between the cars, and drove the bar with which he was "pinching" through his stomach, catching his left foot between the rail and the wheel of the car, and killed him.

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At the place of the accident there was a platform on the side on which Street was struck six or seven feet wide, and on the other side four or five feet wide. Each platform was protected by a railing, so that there was a perfectly safe place to perform the work in which Street and the others with him were engaged, without going between the cars. It plainly appears from the evidence of plaintiff in error that Street had been told time and again to "pinch" the cars from the outside, and not to stand between the cars, or to straddle the rail, and that the danger of getting between the cars had been pointed out to him on the very night of the accident, and but a few minutes before it occurred.

There is no sort of conflict in the testimony that Street had been warned not to stand between the cars. "I told him," says Ballard, a witness for the plaintiff in error, "'Don't get straddle the railing, always 'pinch' from the side of the railing'" (meaning rail). This witness further states that Street had plenty of room to stand on the platform outside of the cars, and that, if he had not been between the cars, he would not have gotten hurt; that he had warned him (Street) that night not to get between the cars, 30 or 40 minutes before; and that he had warned Street to look out for cars as they came up, the instructions being for the men to look out for the cars as they came up to the top of the slope at the end of the piers.

Bunch, another witness for plaintiff in error, engaged at the time in the same work, testifies that they were warned "a thousand times" of the danger of standing between the cars when "pinching" them down to the chute; that the orders they had were to stand outside of the rail, and that this was the habit of those engaged in the work. The witnesses for defendant in error testify to the same effect. The uncontradicted evidence, therefore, is that the customary, proper, and safe way to do the work in which the deceased was engaged was to stand outside of the rail when "pinching" the cars down; that he had been warned of the danger of disobeying the orders given for the safe conduct of the work; that those engaged in this work were not to rely upon warnings of the approach of cars pushed up onto the piers to be unloaded; that it was not customary to ring the bell or blow the whistle of the engine moving the cars up; that the exhaust from the engine coming up the approach was very loud, and would "drown the ringing of the bell"; hence the orders to stand outside of the rail to pinch the cars, and not to stand astraddle the rail.

This being the proof as to the contributory negligence of the deceased, it is clearly not a case in which it can be said that reasonably fair-minded men might differ as to whether or not he was guilty of contributing directly to his own injury. His contributory negligence being the proximate cause of his injury, there can be no recovery. *Bowers v. Bristol*

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Gas & Elec. Co., 100 Va. 533, 42 S. E. 296; Humphreys' Adm'r v. Valley R. Co., 100 Va. 749, 42 S. E. 882; N. & W. Ry. Co. v. Cromer's Adm'r, 99 Va. 763, 40 S. E. 54; C. & O. Rwy. Co. v. Sparrow's Adm'r, 98 Va. 640, 37 S. E. 302; Railroad Co. v. Mauzy, 98 Va. 694, 37 S. E. 285; Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; McDonald's Adm'r v. N. & W. Ry. Co., 95 Va. 98, 27 S. E. 821; N. & W. Ry. Co. v. McDonald's Adm'r, 88 Va. 352, 13 S. E. 706, and authorities cited; Tuttle v. Railroad Co., 122 U. S. 194, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; R. Co. v. Mosely, 112 Ga. 914, 38 S. E. 350; Beach on Con. Neg. § 442.

Where an employee is confronted with two methods of performing work, the one safe, and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method; and any departure from the path of safety will prevent his recovery in the event he is injured. Railroad Co. v. Mosely, *supra*; Bowers v. Bristol Gas & Elec. Co., *supra*.

It follows that we are of opinion that the judgment of the trial court in sustaining the demurrer to the evidence in this case was plainly right, and must be affirmed.

KEITH, P., absent.

BOGARD v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Oct. 13, 1903.)

[76 S. W. Rep. 170.]

Personal Injuries—Complaint—Bill of Particulars—Power of Court to Direct.

Where, in an action against a railway company operating a trunk line through a certain county, with perhaps 50 miles of track therein, over which in the course of 12 months thousands of trains passed at all hours of the day and night, and operated by hundreds of different employees, the complaint alleged that within the last 12 months the defendant, while engaged in operating its road in the county, negligently injured plaintiff by running its engine and train over him, the court had the power to require plaintiff to furnish a bill of particulars averring the time when and place where the accident occurred, whether during the night or day, and whether inflicted by a freight or passenger train, on defendant showing by affidavit or otherwise that it did not have such information, nor reasonable means of obtaining it; but the court could not require plaintiff to give the number of the train producing the injury, or the names of the employees in charge thereof.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Abe Bogard against the Illinois Central Railroad Company. From a judgment dismissing the action, plaintiff appeals. Reversed.

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Hendrick & Miller, for appellant.

Wheeler & Hughes, J. M. Dickinson, and Pirtle & Trabue, for appellee.

BURNAM, C. J. On the 7th of October, 1902, the appellant, Abe Bogard, brought suit against the Illinois Central Railroad Company in the McCracken circuit court to recover damages alleged to have been suffered by him by reason of certain alleged acts of negligence of appellee in the operation of one of its engines and train of cars in McCracken county. The petition is as follows: "The plaintiff, Abe Bogard, says that he is a citizen and resident of the state of Kentucky and county of McCracken, and that the defendant is a corporation authorized by the laws of Kentucky to operate a railroad, and is now, and was at all times hereinafter named, operating and running a railroad in and through the county of McCracken and state of Kentucky, and said defendant is empowered by law to sue and be sued, contract and be contracted with; and heretofore, and within the last twelve months, while engaged in operating and running an engine along its said road in the said county of McCracken, the defendant, without fault or negligence on the part of the plaintiff, carelessly, recklessly, and wrongfully, and by willful, reckless, and wrongful act, ran its engine and train upon and against plaintiff, and knocked him down, and greatly bruised and injured his legs, thighs, hips, back, spine, arms, chest, neck, and head, and made plaintiff sick and sore for many days, and plaintiff's said injuries are permanent, and he will never recover from some of same; thereby negligently inflicting upon him and causing him to suffer great bodily pain and mental agony, and causing him to lose much valuable time, and to incur doctor's bill to the amount of \$25; and by said collision, caused by the negligence and wrongful act of defendant running its engine aforesaid upon plaintiff, he has been damaged in the sum of two thousand dollars (\$2,000). Wherefore he prays judgment against the Illinois Central Railroad Company for \$2,000, his costs herein expended, and for all proper relief." The railroad company, at the appearance term of the action, moved the court in writing to require the plaintiff, in addition to the facts alleged in his petition, to state the date of the injury complained of, the point where it occurred, the number of the train producing it, and the parties in charge thereof. Over the objections of plaintiff, the motion was sustained, and, declining to plead further, his petition was dismissed without prejudice, and he has appealed to this court.

The only question which arises upon the present appeal which is reviewable in this court is whether or not the court below had the power to grant the application of the defendant, and, if so, whether the facts in the case justified their exercise herein. If it has exceeded its authority, we have

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jurisdiction, and it is our duty to correct the error of law. There is no uncertainty or indefiniteness with respect to the nature of the charge made against the defendant. The difficulty under which the defendant claims to labor is that the plaintiff has not sufficiently specified the facts as to the time and place where the alleged acts of negligence occurred to enable it to intelligently defend the action. The defendant operates a trunk line through McCracken county, and it has perhaps 50 miles of track within the county. In course of 12 months thousands of trains pass over its road, operated by hundreds of different employees, at all hours of the day and night. The plaintiff necessarily has information as to the time and place of the accident, whether it was day or night, whether the injury was inflicted by a freight or passenger train; and a state of case might exist when it would be impossible for the defendant to secure this information, so necessary for the proper conduct of its defense. When such a case arises, the trial court has inherent power to require such information to be furnished. This question was very fully considered in the case of *Commonwealth v. Snelling*, 15 Pick. 321. The opinion in that case was delivered by Chief Justice Shaw. It was held that where a person is indicted for a libel containing general charges of official misconduct against a magistrate, the court was authorized to require him previously to the trial, in case he intended to give the truth of the publication in evidence, to file a bill of particulars specifying the instances of misconduct which he proposes to prove. After a thorough review of all the authorities, he says: "The general rule to be extracted from these analogous cases is that where, in the course of a suit, from any cause, a party is placed in such a situation that justice cannot be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form." In *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337, in an action of "crim. con.," the application of the defendant for a bill of particulars was refused by the trial court on the ground of want of power to grant the bill. Upon appeal to the Appellate Court of New York it was held that the court below had the power to grant a bill of particulars. The opinion in that case was written by Judge Rapello, and, after a most exhaustive review of the authorities, English and American, bearing upon the question, said: "In action upon money demands consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen is granted almost as a matter of course; and this proceeding is so common and familiar that, when a bill of particulars is spoken of, it is ordinarily understood as referring to particulars of that character. But it is

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an error to suppose that bills of particulars are confined to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in actions of libel, escape, trespass, trover, and ejectment, and even in criminal cases, on an indictment for being a common barrator, on an indictment for nuisance," etc., and concludes as follows: "A reference to a few of the authorities upon which these decisions were founded will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet the court has authority to compel the adverse party to specify those particulars so far as in his power." A full discussion of the law applicable to motions of this character is found in 3 En. of P. & Pr. 517. The author says: "There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice." "But the rule is quite well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties." We are of the opinion that, upon a proper showing that defendant did not have the information, or the means of readily ascertaining the time when and place where the accident occurred, and whether it occurred during the day or night, or was inflicted by a freight or passenger train, that the plaintiff should be required to furnish such information, if in his power. But it is not necessary or proper in an action for personal injuries that the petition should set out specifically the injuries complained of, or the details of the alleged acts of negligence of the defendant in inflicting the injury. In our opinion, the trial court erred in sustaining the motion to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. It is not at all probable that such information is in his possession, and, if the identity of the train inflicting the injury is established, the means of ascertaining these facts are more accessible to the defendant than to the plaintiff. Nor should the motion have been sustained at all without some showing by the defendant by affidavit or otherwise that it did not have the required information, or reasonable means of obtaining it.

The judgment of dismissal is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

ATLANTA RY. & POWER CO. v. GASTON.*(Supreme Court of Georgia, Aug. 12, 1903.)*

[45 S. E. Rep. 508.]

Street Railroads—Collision with Traveler—Instructions.

The evidence as to negligence was conflicting, but where there was testimony from which the jury could have found that both parties were in the exercise of ordinary care, and that the injury was the result of a casualty, it was error not to charge that the defendant could relieve itself of the statutory presumption by showing that neither party was to blame, and that the damage was the result of a pure accident.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by James Gaston against the Atlanta Railway & Power Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye, for plaintiff in error.

J. C. Clarke and Westmoreland Bros., for defendant in error.

LAMAR, J. The plaintiff was injured in a collision between a street car and his wagon, occurring at the intersection of two narrow streets. The court charged on the doctrine of comparative negligence, and also that "the defendant might relieve itself of the statutory presumption by showing that its agents exercised all proper care and diligence to avoid the injury, or that the damage was caused by the negligence of the plaintiff, or that the plaintiff could have, by the exercise of ordinary care, avoided the injury caused by defendant's negligence; and on either or all of these grounds the defendant may rest its defense." In this and the general charge the judge omitted any statement as to the effect of finding that the injury was occasioned by casualty, where neither party was at fault. The defendant in error insists that this omission does not require the grant of a new trial, since there was no evidence warranting a verdict that the injury was occasioned by an accident. The plaintiff contended that he approached the track at a walk, in the exercise of ordinary care, and failed to see the car because the building on the corner intercepted the view; and further claimed that the car approached at a high rate of speed, without ringing the gong. The testimony of the motorman and several passengers tended to show that the gong was rung; that the speed was proper; that a lookout was kept; and that the plaintiff was driving at a high rate of speed. There was, therefore, evidence from which the jury could have found that the driver and the motorman were both in the exercise of ordinary care, and that both the car and the wagon were being driven at a low rate of speed. If the jury had so found, there would have been a clear case of injury

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resulting from an accident in which neither party was to blame. It often happens that both parties may have been in right, or both in the wrong; but the mutual criminations and recriminations are not necessarily exhaustive of the substantial issues raised by the evidence, and as to which the jury must be instructed. Here it could have found that neither was to blame; and, that being true, it was requisite to charge what would be the effect of such a finding. The failure to so charge deprived the company of the benefit of a substantial defense. When, under the evidence, there are four ways in which the company might relieve itself of the presumption raised by the statute, and the judge only charged as to three, it was the equivalent of saying that the fourth method—in this case an accident—would not relieve from the presumption; and where the evidence was so conflicting, the failure so to charge requires the grant of a new trial. It is unnecessary to consider the other assignments.

Judgment reversed. All the Justices concur, except TURNER, J., not presiding.

DONOHOE *v.* WILMINGTON CITY RY. CO.

(*Superior Court of Delaware, New Castle, Feb. 27, 1902.*)

[55 Atl. Rep. 1011.]

Street Railway—Collision with Team—Negligence—Pleading.

The declaration in an action against a street railway company, alleging that defendant so negligently operated its car that it ran into plaintiff's wagon on the street, sufficiently pleads the negligence.

Action by Edward Donohoe against the Wilmington City Railway Company for injury to plaintiff's wagon. Defendant demurs to the declaration. Demurrer overruled.

The declaration contained but one count, which set forth, *inter alia*, the following: "That the said defendant on the 17th day of August, A. D. 1901, at the city of Wilmington aforesaid, so negligently and carelessly operated one of its said cars that thereby the said car ran into and upon a certain wagon of the said plaintiff, which was then and there, lawfully, and in the exercise of due care and caution on the part of the driver thereof, on one of the public streets of the said city, to wit, on Market street, and thereby the said wagon of the said plaintiff was greatly injured, damaged, and destroyed," and by reason thereof the plaintiff was put to large expense in and about the repair of said wagon, to wit, in the sum of \$200, etc. The defendant demurred to the above declaration upon the following grounds, *viz.*: (1) That the said declaration does not set forth, allege, or describe any particular kind of carelessness or negligence; (2) that said declaration merely sets out a conclusion of law. *King v. Wil. & New Castle Elect. Ry. Co.*, 1 Pennewill, 452, 41 Atl. 975.

Dooley v. Greenfield & T. F. St. Ry. Co

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

William S. Hilles, for plaintiff.

Walter H. Hayes, for defendant.

LORE, C. J. This is a very different case from that of King v. The Wilmington & New Castle Electric Railway Company. The narr. specifically sets forth that the defendant company negligently ran into the plaintiff's wagon, and describes the negligent act.

Demurrer overruled.

DOOLEY v. GREENFIELD & T. F. ST. RY. CO.

(*Supreme Judicial Court of Massachusetts, Franklin, Oct. 20, 1903.*)

[68 N. E. Rep. 203.]

Street Railroads—Injuries to Pedestrians—Contributory Negligence—Evidence.

In an action to recover for the death of plaintiff's intestate, who was run over by one of defendant's street cars, evidence *held* to show that, though deceased stepped between the rails to avoid travelers approaching him on the street, he was guilty of negligence in not stepping off the track, and out of the way of the car approaching him from the rear, and the evidence was therefore insufficient to take the case to the jury.

Exceptions from Superior Court, Franklin County; Lemuel Le B. Holmes, Judge.

Action by Matthew Dooley, as administrator of the estate of Michael Dooley, deceased, against the Greenfield & Turners Falls Street Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Winn & Griswold and A. L. Green, for plaintiff.

Dana Malone, for defendant.

BARKER, J. The plaintiff's intestate was run over and dragged along the ground for some distance by one of the defendant's street cars on September 12, 1902, and was dead when picked up. The action was for negligently causing his death. The motorman of the car and three passengers testified that the deceased was lying on the track between the rails when first seen by them, and that he lay motionless until struck and dragged by the car almost instantly after he first became visible to them, and there was no evidence to contradict this testimony. The evidence which the plaintiff contends should have been submitted to the jury upon the question whether the deceased came to his death while in the exercise of due care was that of four persons who testified that they were riding upon the highway in wagons drawn by horses, and of one person who was riding a bicycle, all going in the direction opposite to that of the deceased and of the

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street car, and that shortly before the accident they met the deceased walking in the highway in the opposite direction to that in which these witnesses were going. This evidence, if believed, would justify an inference that when seen by these witnesses the deceased was walking along the highway towards his home. Three of these witnesses testified that they were in one wagon, and this wagon was the earlier of the two to meet the deceased. The bicyclist was alone, and met the deceased after the meeting between him and the first wagon. The other of these witnesses testified that he was alone in a wagon which rattled and made much noise, and that he was driving at the rate of eight or nine miles an hour. The highway was 55 feet wide, with the car track within its limits, and south of its center line. North of the center line was a macadam driveway, 26 feet wide. At the place where the deceased was struck, a pathway made smooth by the use of foot travelers and bicyclists ran along between the rails of the car track. According to the testimony of the witnesses who testified that they were in the first wagon, the defendant, when seen by them, was walking next to the inside rail of a curve, and on the outside of the rail next to the highway. The bicyclist testified that the deceased was walking outside of the rails when he first saw him, and that the deceased stepped between the rails to get out of the way of the bicycle. The witness who testified that he was riding in the second wagon testified that the deceased was walking between the rails. The night was cloudy, with a strong wind, which blew in the direction opposite to that in which the car was moving, and which made a great noise in the trees. Neither of the witnesses who testified to meeting the deceased walking saw anything of the accident, or knew until the next day that an accident happened. The plaintiff admits that when the deceased was met by the first wagon the car was more than half a mile away, and that it was not in sight when the deceased was met by the bicyclist. The witness who testified that he rode in the second wagon testified that when he passed the deceased the car was from 20 to 30 feet away from the deceased, and that the witness did not see the car stop, and did not stop himself, and that the deceased was walking along, looking ahead, and did not turn his head either way to right or left. He also testified that he said nothing to the deceased, and did not warn him that the car was coming, or say anything to him whatever; that he did not stop to see if any accident happened, because he did not think there would be any; that he supposed the deceased would get off the track. Unless it was competent for the jury to find from the evidence that the deceased did for his own safety what ordinarily careful persons are accustomed to do under like circumstances, the verdict for the defendant was ordered rightly, because of the plaintiff's failure to show that his intestate was in the exercise of due care. Assuming that the jury might

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find, against the testimony of the four witnesses who swore that they saw the deceased lying on the track between the rails, that he was walking between the rails to avoid a wagon approaching him in front, and that when the wagon passed him the car was approaching him from behind, and was only 20 or 30 feet distant, under such circumstances an ordinarily careful person would step off the track, and out of the way of the car, as the witness who testified that he saw the deceased in such circumstances testified that he expected him to do. There was no testimony that the deceased was so walking when struck by the car, and, even if it could be so inferred, no reason consistent with his due care for his continuance upon the track could be drawn, except by conjecture. In our opinion, there was no sufficient evidence to justify the submission of the case to a jury. See *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Brooks v. Old Colony R. Co.*, 168 Mass. 164, 64 N. E. 566.

Exceptions overruled.

SANKER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 4, 1903.)

[55 At1. Rep. 833.]

Injury to Employee—Assumption of Risk.

Where workmen are engaged in repairing a railroad track near a tunnel, they are bound to take notice of the danger and assume the risk of passing trains.

Same—Contributory Negligence.

Evidence in an action to recover for the death of an employee, killed by a passing train while one of a gang employed at work in a railroad tunnel, examined, and *held* that he was guilty of contributory negligence.

Appeal—Record.

Failure to print the opinion of the court below on a motion for a new trial, as required by rule 19 of the Supreme Court, as amended, is ground for quashing the appeal.

Appeal from Court of Common Pleas, Huntingdon County.

Action by Jennie A. Sanker against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The court below (Baily, P. J.) gave binding instructions for the defendant in the following charge:

“Gentlemen of the jury: On January 29, 1899, Thomas W. Sanker, the plaintiff’s husband, being then in the employ of the defendant company as a track repair man, with a number of other employees, was engaged in putting new rails in the northern railroad track of the Gallitzin tunnel, in Cambria county. Traffic over that track was wholly suspended until the work of laying the new rails was completed. The northern track is what is called the west-bound track; the trains westward bound usually use that track. The other, or

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what is called the southern or east-bound track, was not disturbed during the progress of the work on the northern track. It appears that the work of replacing the old rails with new ones on that track was practically completed and the connection made a few minutes before 2 o'clock in the afternoon of that day, and that track was then put into service. Therefore at that time both tracks in the tunnel were ready for service the same as before the work of renewing the northern track had commenced. Neither the plaintiff's husband nor any of the other of the employees was injured in the tunnel while in the performance of that work. When the connection was made, and that track ready for service, the employees, including Sanker, went to the toolhouse, a short distance west of the tunnel, and got their dinners. It appears that some additional bolts were required in the rail splices, and, after the employees had their dinners, they, or at least many of those who had been at work in the forenoon, including Sanker, were ordered to go to the tunnel and put in these bolts. When they got near to the mouth of the tunnel, a freight train had just passed through, going westward, on the track which had been renewed before the men went to their dinners. A heavy cloud of smoke was about the mouth of the tunnel when the employees reached it, and they were directed by the foreman not to enter the tunnel until the smoke would clear away. While they were waiting to enter, another train was heard coming through the tunnel, also going westward. Probably believing this train was on the northern or west-bound track, many of the employees, for the purpose of avoiding being struck by it, congregated on the southern or east-bound track. Unfortunately for them, the train was running on that track; and, probably on account of the density of the smoke hanging around the mouth of the tunnel, they could not or did not see that it was on the track on which they were standing, until it struck among them, injuring quite a number, among them the plaintiff's husband, who died the same day in the Altoona Hospital from the injuries he sustained. His widow, this plaintiff, brings this action to recover damages she has sustained by reason of the death of her husband.

"The principal question which arises in this case is whether the railroad company was guilty of negligence in running this train, which was composed of three locomotives and three cabin cars, westward on the east-bound track. In considering this question as a question of law, we must and do assume the truth of the plaintiff's testimony. The facts, as I have related them, prominently appear in it. It also appears that the employees knew, when they went to the mouth of the tunnel after dinner, that both tracks were in service. They were so informed at the toolhouse before they started for the tunnel. They heard the rumble of the approaching train in the tunnel. They saw the smoky condition of the

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atmosphere at the mouth of the tunnel, which prevented them from seeing into it and ascertaining upon which track the train was running. Unfortunately, they assumed it was on the west-bound track, while in fact it was on the east-bound track. They were not told it was on the west-bound track, but seem to have taken that for granted. Both tracks being in service, the railroad company had a right to run its trains upon them as frequently as, and in whatever direction, it saw fit. The plaintiff's husband, when he entered into the employment of the railroad company, assumed the risk of all dangers incident to his employment, however they may arise, against which he may protect himself by the exercise of ordinary care. On account of renewing the rails of the northern track in the tunnel, it appears that a number of freight trains were halted east of the tunnel, which blocked the approach to it on that track. The train which had passed around this blockade of cars and which struck the employees was desired to be hurried to its destination to relieve a blockade at a point west of the tunnel. We cannot see upon what principle it can be held for negligence in running a train around this blockade of its freight trains that it might speedily reach its destination to perform the duties to which the locomotives and cabins which composed it were assigned. The mouth of the tunnel was clouded with smoke, so that these employees could not see upon which track this train was running. The ringing of the bell of the locomotive and the lights upon it could neither be heard nor seen by them. They should, therefore, have been more cautious to ascertain upon which track it was running, before voluntarily placing themselves upon either track. There was a place of safety for them alongside of the track, which is called in the testimony the 'ditch.' As the railroad company had a right to use its tracks in such a way as it thought best to conduct its traffic, the sad mistake of these employees to assume that this train would run on a particular track is not to be imputed to negligence on the part of the company. It did not, either expressly or by implication, advise them to be at the place they were at the time they received their injuries. There is no evidence that the company or those in charge of the train knew or had reason to believe that these employees were upon the south track. Their duty did not call them to be there. There is some evidence that Ehrenfeld, the supervisor of the defendant company, and in charge of the maintenance of the tracks through the tunnel, told the employees that there would be no single-track movement of the trains in the tunnel while the employees were at work. There is no evidence that there was any such movement of the trains when the employees were in the tunnel, or until after both tracks were ready for service and the employees had notice of it. While we sympathize with this plaintiff and the employees who were injured upon that unfortunate afternoon, I cannot

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declare the law different from what I understand it to be. I have put myself clearly upon the record, and if I have erred I have the satisfaction of knowing that my judgment can be reviewed by a higher court, and corrected, if I am mistaken. It is your duty to render a verdict in favor of the defendant."

The court subsequently, on a motion for a new trial, filed the following opinion:

"There was no dispute about any material facts in this case. The question whether they were sufficient to convict the defendant of negligence was for the court. The cases are numerous that upon an undisputed state of facts it is the province of the court to pass upon the question of the defendant's negligence. *Koons v. Western Union Telegraph Co.*, 102 Pa. 164; *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Cogle v. McKee et al.*, 151 Pa. 602, 25 Atl. 115. The notice given to the plaintiff's husband and the other employees at the toolhouse, before they returned to the tunnel, after dinner, that the tracks were clear, and trains would be run as usual on both tracks, was a countermand of the notice given them earlier in the day that there would be no single-track movement on the south track. After giving this notice, the defendant owed these employees the same, and no greater, duty, it did, as if the first notice had not been given. The defendant reassumed its right to run its trains on both tracks as it saw fit, and it was the duty of the trackmen to keep out of their way. There was no necessity for them to be on the south track. Ample space was provided where they could have escaped injury from passing trains on either track. That they chose to seek safety on the south track was no fault of the defendant. It is well known that the 'usual' way the defendant operates its road is to use all its tracks in such manner as the exigencies or circumstances may require, and that it is not unusual for it to run for a short distance west-bound trains on the track ordinarily used for east-bound trains and vice versa. That the repairing of railroad tracks in or near a tunnel is obviously dangerous when the tracks are in service cannot admit of any doubt or question. The danger is so patent that the employee is bound to take notice of it. *Devlin v. Phoenix Iron Co.*, 182 Pa. 109, 37 Atl. 927. A servant assumes all such risks arising from his employment as he might have known were reasonably incident thereto, and he cannot recover against the master for injuries arising from such patent risks. *Schall v. Cole*, 107 Pa. 1. A track repairer assumes the risk incident to trains passing to and fro at the point of his employment. *Palko v. Central R. Co. of N. J.*, 9 Kulp, 550. Neither duty nor necessity required the plaintiff's husband to be on either track at the time of the accident. He voluntarily chose to be on the south track, evidently for the purpose of avoiding a passing train, which he believed was approaching on the north track. This proved to be an error of judgment on his part. For this the defendant

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was not liable. It was not guilty of negligence in running its trains as it saw fit on its own tracks after it had given notice to Mr. Sanker and the other employees who had been at work in the tunnel that day that both tracks were clear, and that trains would be run on both as usual. For these reasons the motion for new trial must be overruled."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

E. H. Flick and H. C. Madden, for appellant.

J. D. Dorris, for appellee.

PER CURIAM. Under the uncontradicted evidence in this case, the plaintiff's husband was guilty of contributory negligence. This does not appear solely from the evidence of defendant, but her own case discloses it, as so clearly shown from the opinion of the learned judge of the court below on the motion for a new trial. We discover on a glance at the record copied in the paper book that on October 14, 1901, the opinion on the motion for a new trial was filed in the court below. This was not printed. But by going to the record in the office of the prothonotary we discover it. The neglect to print is a flagrant violation of the rules of this court. It is a most important paper, bearing directly on the issue and the assignments of error, and, if a motion to quash for this reason had been made by appellee's counsel, it would have been sustained at bar. But from a neglect to make such motion, equaled only by appellant's neglect to print the opinion, we permitted the argument on the merits to proceed. Hereafter, for such palpable disregard of rules, we will, of our own motion, quash the writ.

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(*Supreme Court of Georgia, Aug. 14, 1903.*)

[45 S. E. Rep. 453.]

Care Required of Employee.

The rules of diligence must be adjusted to the character of work in which the plaintiff is engaged.

Same—Doing Dangerous Work in Obedience to Orders—Assumption of Risk.*

Where one is employed in a work which necessarily involves more or

*As to assumption of risk of, and contributory negligence in, doing dangerous work in obedience to orders, see *Long's Adm'r v. Illinois Cent. R. Co.* (Ky.), 6 R. R. R. 349, 29 Am. & Eng. R. Cas., N. S., 349; note, 11 Am. & Eng. R. Cas., N. S., 429; *Whatley v. Macon & N. Ry. Co.* (Ga.), 11 Am. & Eng. R. Cas., N. S., 425; *Georgia v. Mobile, etc., R. Co.* (Ala.), 4 Am. & Eng. R. Cas., N. S., 257; *Allison v. Southern Ry. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 714; *Louisville So. R. Co. v. Tucker* (Ky.), 12 Am. & Eng. R. Cas., N. S., 805; *Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781; notes, 20 Am. & Eng. R. Cas., N. S., 305; 12 Am. & Eng. R. Cas., N. S., 672.

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less danger, he assumes the risks ordinarily and usually incident thereto; but he has no right to subject himself to unnecessary risks or unusual dangers, even when ordered so to do.

Same.

What a man of ordinary prudence would do when employed in dangerous work is the standard by which the law measures the diligence or negligence of other employees similarly engaged.

Same—Doing Dangerous Work in Obedience to Orders.

Where one engaged in dangerous work is directed by his superior to perform a given act, he may without negligence obey such direction, if the danger incident thereto is not unusual, or the risk beyond that necessarily contemplated in his employment.

Same—Same—Making "Running Drill" Contributory Negligence.

Where a train hand is directed to assist in making a "running drill," his obedience will not render him guilty of contributory negligence, if the circumstances of making the uncoupling are such that a prudent man engaged in the same employment would assume the risk of such act.

Instructions.

There is a difference between issue and evidence, and the requirement that the judge shall instruct the jury as to all the issues raised does not impose on him the duty of singling out particular portions of the evidence, and charging thereon.

Same.

In the absence of a special request, the judge is not bound to instruct the jury as to the effect of an admission by either party to the record.

Same—Rulings.

There was no error in the rulings of the court or in the charge to the jury.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. D. Evans, Judge.

Action by E. Lattimore against the Wrightsville & Tennille Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Daley & Bussey, for plaintiff in error.

Hardwick & Hyman, for defendant in error.

LAMAR, J. Lattimore was a train hand. He contends that, while the train was running at considerable speed, he was standing on a flat car, and was ordered by the conductor to uncouple the cab, for the purpose of making a "running drill;" that, while he was leaning forward, in the act of obeying the order, the conductor, who was standing on the cab, pulled out the pin, waved the engineer forwards; that by reason of the jerk, Lattimore lost his balance, and was thrown on the track, and run over by the moving cab. The company insists that the verdict in his favor should be set aside, because, in view of the speed of the train, the act of uncoupling was dangerous; that Lattimore had no right to obey the order; and that the court erred in charging that the plaintiff would be at fault in obeying the conductor if the act of uncoupling was, under the circumstances, obviously dangerous. The proper work of a brakeman is frequently dangerous, and if the mere fact of danger warranted him in refusing to obey,

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he would rarely be in position to comply with an order to couple, or to do many other acts in the line of his employment. He, however, assumes the usual risks of the business, and, if injured therein without fault on the part of the company or a fellow servant, he cannot recover from the railroad company. But while he may incur the usual and ordinary risks incident to the service, he cannot assume unusual risks, or expose himself to dangers out of the ordinary, and then hold the master responsible when injured by the act of a fellow servant. He must be free from fault. Civ. Code 1895, § 2323. For him to take unusual risks is to be at fault, even though he has done so under the immediate orders of his superior officer; for the conductor has neither express nor implied power to subject him to unusual risks, and the servant must decline to act in such cases. The rules of diligence must be adjusted to the particular service. In this, as in other instances, the man of ordinary prudence furnishes the standard by which the conduct of others is to be measured. If the danger of uncoupling in the particular instance be such that an ordinarily prudent man would decline to act, and wait for a safer and less hazardous opportunity, then all other train hands, acting under similar conditions, must likewise refuse to act, and wait for a safer time and place. No one has the right to expose himself to manifest dangers, or to those of a kind or of a degree not contemplated in the employment. If the speed of the train, the difficulty of uncoupling, the state of the weather, the darkness of the night, the want of a lantern, the condition of the cars, the grade of the track, the brakeman's peculiar position on the car, or other circumstances, be such as to involve risks beyond those usually incident to the business, and which a brakeman of ordinary prudence would not incur, no other train hand would be justified in exposing himself to such unusual risks, even if ordered so to do by the conductor. The charge, taken as a whole, was in accordance with the views above expressed, and under it the jury evidently found that the speed was not too great for a prudent brakeman to undertake the task of uncoupling, and making the "running drill."

The company contended that Lattimore had admitted that he was injured through his own fault, and error is assigned because the court failed to present this material issue to the jury. The court is required to charge on the various theories of negligence raised by the evidence, but is not required to treat the evidence itself as an issue. The issue involved was whether Lattimore was at fault; not how that negligence was proved. Besides, the court is not required to charge on the effect of admissions, without a special request to that effect. Civ. Code 1895, § 5189; *Hawkins v. Kermode*, 85 Ga. 116, 11 S. E. 560 (3); *Phoenix Co. v. Gray*, 113 Ga. 424, 431, 38 S. E. 992.

It is unnecessary to set out at length that part of the argu-

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ment of counsel for plaintiff which was objected to, and on which a motion for a mistrial was made. It was, in substance, that corporations generally have no soul, and "he was satisfied from the evidence in this case that the same was true of the Wrightsville & Tennille Railroad Company." This argument was of the character which has been criticised by this court in several cases. See *W. & A. R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74, and cases there cited. But, under the peculiar circumstances here, we do not think it requires the grant of a new trial. It appeared in the evidence that the defendant had supplied the injured plaintiff with a physician, and rendered him other valuable services. From a note of the judge, it also appears that the argument complained of was in answer to one by the company's attorney, in which he claimed that the defendant had been generous in its treatment to the plaintiff. Counsel for the plaintiff contended that there was other evidence in the case to show great want of consideration for the plaintiff, and in the course of this discussion he used the language above set out. Improper argument on the part of one counsel is no excuse for improper argument by his opponent; but here the contention was based on evidence, and that of the other is likewise founded on the same and additional testimony. Where, as in this case, the defendant put its character in issue, the plaintiff would be entitled to reply in kind. Certainly no new trial can be granted, for the further reason that the contention that the language used was inflammatory was apparently not well founded. The argument evidently did not influence the jury, for the amount found was small in view of the serious character of the injuries. If the discussion had any effect whatever, the railroad company evidently got the best of the argument in the reduction of the verdict. Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

CULPEPPER v. ARKANSAS SOUTHERN R. CO.

(Supreme Court of Louisiana, June 23, 1903.)

[34 S. E. Rep. 761.]

Injury to Railroad Employee—Negligence—Jurisdiction.

Where injury is caused a person through the fault of a railroad company in the running of one of its trains over its own tracks, which it had placed or left in such a condition as that running a train over them would be likely to result in accidents, the company is guilty of a fault not only of omission but of commission, and the court of the parish where the accident occurred has jurisdiction over an action brought by the person injured for the recovery of damages.

Monroe and Provosty, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court, Parish of Jackson; Marion Franklin Machen, Judge.

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Action by William W. Culpepper against the Arkansas Southern Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

Hudson, Potts & Bernstein, for appellant.

Price & Roberts, for appellee.

Statement of the Case.

NICHOLLS, C. J. The question before us for decision is as to the jurisdiction of the district court of Jackson parish. Defendant's exception to the jurisdiction of that court having been sustained, and his demand dismissed, he has appealed.

The action is one of tort, brought against the defendant railroad corporation for damages for having, through its fault and negligence, caused the death of Charles S. Culpepper, the son of the plaintiff.

The allegations as to the cause of the injury, and the facts, were that on the night of the 6th of October, while the son was employed and in the service of the defendant company as locomotive engineer, at a point on the railroad of defendant company about 1½ miles south of the town of Jonesboro, in the parish of Jackson, the locomotive upon which he was employed in the service of defendant left the railroad track, careened to one side, and overturned into the ditch; that petitioner's son, the engineer upon the locomotive, was caught by the wreck of said engine and cab, and firmly held under a fierce and constant stream issuing from the boiler and steam pipes of said locomotive, in close and direct proximity thereto, until he was extricated from his perilous position some time after by the passengers upon the said train; that while their son was so confined by said wreck he was burned, bruised, and scalded in a most horrible manner, and, both while in said situation and for many hours thereafter, suffered excruciating pain and trouble and agony, until relieved of his untold and indescribable suffering by death, which occasioned several hours thereafter.

That this disaster was caused by the defective machinery, deficient and insecure rails, rotten cross-ties, and defective material, and the improper construction and inadequate efforts to repair the roadbed and dump or embankment at the point at which said accident occurred. That said rails and cross-ties were totally unfit for the service required, and the usage for which they were subjected. That the rails were greatly worn by age and use, being secondhand at the time they were laid, very light in character, and of a type and material long since discarded by first-class railroad corporations; that the embankment at which this calamity occurred was at the south edge of a trestle crossing a stream of water, and was in the neighborhood of 15 feet in height; that it was of very faulty construction, and imperfect, and not fitted for the proper running of railway trains thereon; that the base of said em-

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bankment and dump was not sufficiently wide to afford the ordinary slope given to railroad embankments and to render the same solid and secure, this causing the top of said embankment, which formed the foundations of the track at that point, to be entirely too narrow, and the slope of the embankment too steep, to have sufficient strength to maintain and support the weight with safety necessary to be placed thereon by the running of locomotives and cars thereon.

That said embankment, at the point where said wreck occurred, had become out of repair by the sliding down of dirt from the top and sides thereof during the winter of 1901 and 1902, and the said railroad, in their efforts to repair the same, instead of replacing the defective parts of said embankment with dirt and gravel or other suitable material, as they should have done, resorted to the parsimonious subterfuge of placing under the ends of the said cross-ties, and at lengthway with the railroad, and directly under the rails, a wooden plank to support the same, filling under and over said plank with dirt, thus rendering said track and roadbed totally unsafe and dangerous, to the full knowledge of the said defendant company and its general managers; that said road at said point was permitted to remain by the managers of said railroad in this insecure and dangerous condition until the time of said accident, the only effort to repair the same being the deposit from time to time of a small quantity of loose earth upon the top of said wooden plank, thus concealing said defect from the operators of said road, and without in any manner rendering the condition of said embankment more secure; that, after the concealing of said defects in said road by the placing of dirt upon said wooden plank therein, petitioner's said son took employment in the service of said company, which employment only lasted a few days before he met his death as above described.

That, on account of the defective condition of said roadbed and track at said point, when the local freight train going north on the night of the 6th of October passed over the point above mentioned it caused a part of the said embankment and track under which said wooden plank was placed to give way, the plank and dirt supporting the same sliding from its position, or loosening to such an extent as to be easily slid to one side; and when the engine upon which petitioner's son was employed as an engineer was attempting to pass over the same several hours thereafter, and at about 12:15 a. m. on the morning of October 7, 1902, the engine and tender careened, left the track, and turned over down said embankment, causing the injury of petitioner's son as above set forth.

That notwithstanding that said defendant company well knew of the faulty and dangerous condition of its railroad track as above alleged, and the faulty method adopted in attempting to repair the same, and the absolute need of re-

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pair in strengthening said track, they have for the past 12 months pursued a parsimonious policy in cutting down the number of its repair forces and reducing its efficiency, so that at the time of, and long prior to, said calamity, said force was totally insufficient and inadequate to make the usual and customary repairs on its track, which was imperatively required by its dangerous and unsafe condition, thus willfully and wantonly jeopardizing and sacrificing the safety and lives of its employees and of the traveling public.

Petitioner avers that on account of the facts above set forth, all of which were well known to said defendant company, the death of the said son, Charles Stewart Culpepper, was caused by the gross, wanton, and criminal negligence and faults of said defendant company in using defective material and insufficient and faulty rails and ties, and the criminal neglect to repair its roadbed in a proper and safe method and put the same in a safe condition for traffic and traveling, and in permitting plank or slabs to be placed in and to remain in the dump or embankment of said track, for months at a time, as was done in this instance.

Petitioner avers that no fault of any nature attaches to said engineer, as his fellow servants were faithful and competent in discharging the important duties assigned to them, and ignorant of the fact of the defective and dangerous condition of said railroad track, and that plank or slabs had been placed in the dump or embankment at that point, or that the said dump had given way after the passage of the freight train over the same that night as above set forth.

Defendant excepted that its domicile was in the parish of Lincoln, and that for all acts of omission or passive acts it should be sued at its domicile, and the court for Jackson was without jurisdiction. In support of this position it relied upon paragraph 9 of article 165 of the Code of Practice, which declares that "in all cases where any corporation shall commit trespass or do anything for which an action for damages lies it shall be liable to be sued in the parish where such damage is done or trespass committed," and upon the decisions of this court in *Montgomery v. La Levee Company*, 30 La. Ann. 609, *Heirs of Gossin v. Williams & R. R. Co.*, 36 La. Ann. 186, and *Caldwell v. R. R. Co.*, 40 La. Ann. 753, 5 South. 17, to the effect that the provisions of that article applied to acts of commission, and not to acts of omission.

The court adopted defendant's view of the legal situation, and dismissed the suit. We think it erred, and that the case fell under the rule announced in *Castille v. Refinery*, 48 La. Ann. 330, 19 South. 332, in which this court held that, "where the force brought into operation which caused death was actively set and brought into action through agencies controlled by the defendant company, the latter was suable in the parish where the tort was committed."

Here the ground of action assigned was not only a passive-

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fault and wrong through the bad condition of the embankment, but an active fault of "commission" by the defendant running its trains over the faulty road base and tracks and the dangerous embankment. If plaintiff's allegations be true, defendant was guilty of two faults—one of "omission" in not placing its embankment, roadbed, and tracks in good condition; the other in having, after it had placed or left them in bad condition, itself brought about the injury by the act of "commission" in running its trains over such roadbed and tracks.

Viewing the action from this standpoint, we think the district court of Jackson had jurisdiction. Whether or not plaintiff can sustain his action on a trial upon the merits is a question not yet before us or before the latter court.

For the reasons assigned it is hereby ordered, adjudged, and decreed that the judgment of the district court be, and it is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the exception filed by the defendant to the jurisdiction of the district court be overruled as not well grounded, and that the cause be reinstated in the district court for the parish of Jackson. It is further ordered, adjudged, and decreed that this cause be remanded to the district court for that parish, and there proceeded with according to law.

MONROE and PROVOSTY, JJ., dissent.

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(*Supreme Court of Rhode Island, June 19, 1903.*)

[55 Atl. Rep. 718.]

Death of Brakeman—Looped Telltales—Knowledge of Railroad—Evidence.

In an action for the death of a railway brakeman by his being caught and thrown from a freight car by certain looped telltales, evidence that other telltales in the freight yard where the accident occurred, shortly before the happening thereof, had become looped in the same manner, was admissible to show that the railroad company knew, or ought to have known, of the danger connected therewith, and was negligent in not remedying the defect.

Same—Same—Negligence—Evidence.

Where a brakeman was killed by being thrown from a car by certain looped telltales, evidence that the ropes of the telltales forming the loop by which deceased was caught were knotted at the end was competent, notwithstanding negligence in that regard was not alleged, for the purpose of describing the entire telltale, and showing a loop formed of ropes so knotted was more dangerous than a loop formed by ropes free from knots.

Striking Out Evidence.

Where evidence is admitted without objection it cannot be stricken out on motion at a subsequent stage of the trial.

Death of Brakeman—Looped Telltales—Negligence—Evidence—Cross-Examination.

Where, in an action for the death of a brakeman caused by his being thrown from a car by a looped telltale, defendant's expert bridge super-

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intendent, who had charge of the telldales on the railroad, had been fully examined by defendant regarding the proper construction and inspection of these appliances, it was not error to permit him to testify on cross-examination that if the telldale was so looped or twisted together that a man going along on the top of a car and running into it was caught by the chin and held there, so that he was dragged over the car he was on and the next one, the telldale was not in proper position.

Same—Same—Evidence—Harmless Error.

Where, in an action for death of a brakeman thrown from a car by a looped telldale, defendant had introduced evidence of orders given to the brakemen in the yard requiring them to straighten out telldales which were looped up, the exclusion of evidence that it was customary for a brakeman in pursuance of such orders to straighten out the telldales when he saw them looped was not reversible error, there being no occasion for proof of a custom.

Instructions.

The refusal of a requested instruction, fully covered by an instruction given, was not error.

Death of Brakeman—Looped Telldales—Assumption of Risk.

In an action for death of a railway brakeman by being thrown from a car by looped telldales, an instruction that if deceased knew, or by the exercise of reasonable care might have known, that telldales are apt to become looped, he assumed the risk of injury therefrom, was properly refused for omission to require that deceased had knowledge of the danger reasonably to be anticipated from such looped telldales.

Same—Same—Same.

Where a brakeman who was standing on top of a furniture car, with his back toward the engine, where his duties required him to stand in order to transmit signals to the engineer, was struck by looped telldales, and thrown from the car, an instruction that if he might have known that the telldales were apt to become looped from time to time he assumed the risk of injury was properly refused for failure to include the brakeman's position and duties at the time of the accident.

Same—Same—Same.

Where, in an action for death of a brakeman by being thrown from a car by looped telldales, there was no evidence that deceased was ever instructed to untie looped telldales or that he appreciated the danger from such looping, and was not absorbed in his duties at the time of the accident to such an extent that he had no thought of their condition, an instruction that if he had been told to look out for such telldales, and untie them when he found them looped up, defendant was not liable for his death, was properly refused.

Same—Same—Negligence—Fellow Servants.

Where it was the duty of a railroad company to see that telldales were in proper condition, and were not looped up, instructions, in an action for death of a brakeman by being thrown from a car by looped telldales, that if it was customary for the yard brakemen to look out for such telldales, and untie them when they were looped, the failure of such yard brakemen to do so was the negligence of a fellow servant, and hence defendant was not liable, were properly refused; the negligence in failing to see that the telldales were in proper condition being that of the railroad company, and not that of decedent's fellow servants.

New Trial.

Where the charge as given by the court, with the requests given, stated the law applicable to the case with substantial accuracy, a new trial will not be granted for the court's refusal to give a particular request.

Death of Brakeman—Looped Telldales—Negligence—Sufficiency of Evidence.*

In an action for death of a brakeman by being thrown from a car by

*As to the duty to erect telldales or whipping straps, and to maintain them in safe condition, see note appended to *Dolan v. Sierra Ry. Co.* (Cal.), 2 R. R. R. 879, 25 Am. & Eng. R. Cas., N. S., 879.

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looped telltales, while he was approaching them with his back to them in the performance of his duties in transmitting signals from switchmen to the engineer, a verdict in favor of plaintiff, on the ground that the railroad company was guilty of negligence in failing to keep such telltales in proper position, *held* not contrary to the evidence.

Same—Same—Contributory Negligence—Question for Jury.

Where a brakeman was thrown from a freight car by looped telltales, which he struck while riding on the car with his back toward them, which was necessary in the performance of his duties in transmitting signals from switchmen to the engineer, whether he was in the exercise of ordinary care at the time of the accident was a question for the jury.

Action by Theresa McGarrity, as administratrix of the estate of Hugh McGarrity, against the New York, New Haven & Hartford Railroad Company. A verdict was rendered in favor of plaintiff, and defendant applies for a new trial. Application denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff.

David S. Baker and Lewis A. Waterman, for defendant.

TILLINGHAST, J. The plaintiff's intestate, Hugh McGarrity, lost his life by being caught by the neck in a telltale on the defendant's railroad near the Conant street bridge, in the city of Pawtucket. He had been in the defendant's employ at its freight house in Pawtucket, trucking freight, for several years, and until a day or two before the happening of the accident in question.

The facts connected with the happening of the fatal accident are substantially as follows: On the 30th day of August, 1900, said Hugh McGarrity was in the defendant's employ in the capacity of head brakeman, and was at work on freight cars in the freight yard of the railroad at Pawtucket, his duty being to aid in switching cars back and forth on the various tracks of the yard. In doing this the cars were hauled forward from the various sidings in the yard onto the main track, which was connected with all the sidings. This track ran under the Conant street bridge. When the cars were far enough over the switch to clear it, it would be turned, and the cars would be pushed back wherever they were going for the time being. Said bridge had a telltale north of it, to warn the brakemen when they were approaching the bridge from that direction that they must stoop. On the day of the accident McGarrity was standing on top of a furniture car that was being hauled forward from one of the sidings. Three of the ropes of the telltale near the bridge had become looped in some way in a sort of half-hitch; that is, one rope was thrown about two of the others and looped over. In some way McGarrity's neck was caught in this half-hitch, and the ropes held together in such a manner that he was dragged off of his feet and thrown from the car, receiving injuries from which he shortly afterwards died. The

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plaintiff was afterwards appointed administratrix of his estate, and she brings this action for the benefit of herself as widow and the children of the deceased, alleging in her declaration that the defendant "unlawfully, negligently, and carelessly suffered and permitted its certain appliance, to wit, a railroad telltale, then and there owned, provided, and maintained in its freight yard adjacent to said railroad bridge, to become and be in a dangerous, improper, and unsafe condition, and perilous to the safety and health of the plaintiff's intestate, Hugh McGarrity, in that the hanging cords or ropes which then and there hung from the crossbars of said telltale, and which were a part and parcel thereof, became and were caught, tangled, and twisted together so that the same were liable to catch the plaintiff's intestate, * * * of which dangerous condition of said telltale the plaintiff's intestate was unaware." At the time of the accident McGarrity was standing about in the center of the roof of the furniture car, which is one of the highest types of a freight box car, being from 18 inches to 2 feet higher than the ordinary box car. He was the head brakeman, and it was his duty to be upon the first or head car on the train, and to take signals from the switchman in the yard and transmit them to the engineer, the proper discharge of which duties necessitated that he should have his back to the engine, the way the train was going, in order to see the switchman and take the signals. He was standing in this way at the time of the accident. The telltales consist of a bar of wood or iron extending over the track, and supported by posts upon either side, from which short ropes are suspended at such a height as to strike brakemen about the head and shoulders when riding on box cars and approaching the bridge. These ropes are sometimes called lashes, and are hung about six or eight inches apart. The telltales in question consisted of ropes about half an inch in diameter and about two feet long, wound about at the bottom end with fine wire or string to prevent the ropes from unraveling and fraying at the ends. Said half-hitches or loops in the telltales were formed by the exhaust of the engine when passing under them. There is evidence to the effect that the ends of the ropes in question had become frayed by reason of the unraveling of the wire or string which bound the ends, and that the ends afterwards became enlarged, and sometimes were knotted, forming a bunch at the end; and also that, whenever ropes which were thus knotted were thrown together in a half-hitch or loop, the loop tended to tighten and bind, upon pressure, by reason of the enlarged condition of the ends of the ropes.

At the trial of the case to the jury a verdict was rendered for the plaintiff, and the case is now before us upon the defendant's petition for a new trial on the grounds of certain alleged erroneous rulings of the trial court in the admission and rejection of testimony, and also in his charge to the jury;

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that the verdict is against the evidence; and that the damages awarded are excessive.

The first class of exceptions relied on by the defendant are those which were taken to the admission of testimony as to the condition of the telldales in said freight yard at various times shortly before the happening of the accident; it being contended in support of these exceptions that whether this telldale and others in the immediate vicinity had been looped up at some previous time, unless the particular looping which caused the injury had continued down to the time of the accident, or whether other telldales had become looped up in a similar manner, was immaterial; that to allow this to be shown was to permit the plaintiff to prove other acts of negligence, and thereby prejudice the defendant's case.

This position is untenable; for while it is true, as held by this court in *Agulino v. N. Y., N. H. & H. R. Co.*, 21 R. I. 263, 43 Atl. 63, that in an action of negligence the plaintiff cannot be permitted to show facts and circumstances connected with other accidents or other occasions which would tend to raise collateral issues, yet it is not the law that only the particular facts and circumstances immediately connected with the happening of an accident can be shown in evidence. On the contrary, the plaintiff may properly show the condition of the machine or appliance by which the injury was caused before the time of the accident, for the purpose of proving that the defendant knew, or ought to have known, of the danger connected therewith, and was negligent in not remedying the defect.

After the plaintiff had rested her case, defendant's counsel moved the court to strike out all the testimony which had been introduced showing that the ropes of the telldale forming the loop by which the deceased was caught were knotted at the ends. This motion was refused, and the defendant excepted. The ruling was correct. It was clearly competent for the plaintiff to show the particular condition of the telldale in all its parts at the time of the happening of the accident. The presiding justice said: "The description of the telldales—what they were made of—I think was very properly put in, notwithstanding the fact that no particular stress was laid in the declaration upon the fact that there was a knot at the end of it. They had a right to describe that whole telldale from beginning to end, but when they come to lay stress upon it, and say that it is what held it, I think they haven't a right to do it."

This ruling, taken as a whole, was quite as favorable to the defendant as it was entitled to. Indeed, we fail to see why the plaintiff had not the right to lay stress upon the fact that the ends of the rope were knotted for the purpose of showing that a loop, when formed of three of such ropes, was much more dangerous than a loop formed by ropes which were free from knots.

We deem it proper for us to observe, in regard to the exception now under consideration, that the practice of allowing testimony to be introduced without objection, and then, at some subsequent stage of the trial, moving to strike it out, should not be encouraged. As a rule, the objection should be made when the testimony is offered, and if not then made it should be deemed to be waived. Otherwise a party could sit by during a protracted trial and allow all sorts of testimony to go in, and then call attention to such parts thereof as he saw fit by way of objection, and move to strike it out, thus putting the other party to a disadvantage by putting him off his guard, and causing confusion and delay in the trial of the case.

The next exception is to the ruling of the court in permitting one of the experts called by the defendant to answer the following question: "If the telltale is so looped or twisted together that a man going along on the top of a car and running into it is caught by the chin and held there, so that he is dragged over the car he is on and the next one, was that telltale in proper position when he got to it?" His answer was: "I should say not." The argument against the admission of this testimony is that the accident in question was a very peculiar one, and, so far as known, no such a one had ever happened before; and that the question is not what a man's opinion as to whether a thing is proper or not is after he has observed the accident in question, but what would be his opinion as to the condition of the thing concerning which he is testifying prior to the occurrence of the accident. In short, the argument is that the defendant would not be chargeable with knowledge of the danger where such knowledge was acquired in consequence of the accident in question. We agree to the soundness of this part of the argument, but do not think it is pertinent in the case at bar; for it cannot be said with any show of reason that a telltale in the condition that the evidence shows this one to have been was not a dangerous appliance, and it did not require the testimony of an expert to prove this. And while it is true that no evidence was offered that such an accident ever happened before, it cannot be said that, in view of the conditions existing, it was not such a one as was liable to happen. While there was no occasion, therefore, for the production of expert testimony to show that the telltale was out of order and dangerous to brakemen while in the discharge of their duties, yet the error in admitting it, if it can properly be said to be error, was clearly harmless to the defendant. Moreover, it is to be noted that the witness John B. Sheldon, of whom the question now under consideration was asked, was the supervisor of bridges for the defendant corporation, and had charge of the telltales on the railroad, and he had been fully examined by defendant's counsel as an expert regarding the proper construction and inspection of these appliances, and hence it

would seem that the question was pertinent in cross-examination.

The defendant claims that the court erred in excluding testimony that it was customary for the brakemen to straighten out the telltales when found to be looped up. The witness George H. Coffin, called by the defendant, having testified that he was a brakeman at said yard, was asked the question: "Were orders given to the brakemen as to those telltales?" He answered: "I had orders ever since I worked on the road." "Q. Were orders given to the brakemen, no matter what time, as to those telltales? A. Yes sir. Q. What were those orders?" This was objected to by Mr. Hogan on the ground that it was mere hearsay. The court said: "If the orders were general, given at the time or about the time that this man went there—if you can trace them home to him—it would be pertinent. But those orders may have been given some time before, and may not have been obeyed or considered by the brakemen, and it may be they were given when it was too late for this man to know anything about it. If you can show those orders were given about the time the deceased went on the road as a brakeman, it would be proper to show that to affect, if it would, the testimony of the track-walker, who says he did walk the track and did look out for those things. If he did those things, of course the brakemen could assume that the railroad corporation was looking out for those things." Mr. Waterman, in behalf of the defendant, said: "The track-walker said it was done between Providence and Worcester, but not in this section." The court: "It is necessary to show that the instructions given were so close to the time of this accident that the men presumably knew what the orders were." Mr. Baker's exception was then noted, but he immediately proceeded to show by the witness, without objection, that the orders referred to were given ever since he had worked on the road and down to the time when McGarrity was hurt. "Q. What were those orders? A. If you see any of those telltales looped up or anything, straighten them out. Q. How would you straighten them out when you saw them looped up? A. By hand. Q. Where would you be when you did it? A. On top of the car. Q. And could a brakeman in the performance of his duty see when it was looped up readily? A. Yes sir. Q. Was it customary for the brakeman, in consequence of those orders, to straighten out the telltales when he saw them looped up?" Mr. Hogan: "I object to the custom there." Mr. Waterman: "I have shown that orders were given." The court: "How is the question material?" Mr. Waterman: "I was stating it was material, in connection with what has been shown, that orders were given to do this thing, and I am showing it was customary for brakemen to do those things in consequence of orders, and it would be brought home to Mr. McGarrity by the orders and by brakemen being accustomed to do those things

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while they were there." The court ruled that the particular question objected to was not proper. While we fail to see any very cogent reason for ruling out this particular question, yet the error, if it were such, was clearly harmless, and hence not such a one as to be ground for a new trial.

The defendant had already been allowed to show the orders which were given to the brakemen in the yard concerning that telldales, and also to offer testimony that the brakemen had obeyed such orders. In other words, the defendant had been permitted to show, in effect, what the custom of the brakemen was in the premises, and hence the particular question asked was practically calling for the repetition of a fact already proved. Moreover, it was competent for the defendant to call all of the brakemen in said yard, and prove by them, if it could, that they knew of and obeyed the orders referred to; so that it would seem that there was no occasion for offering proof of any custom, and also that the evidence offered was not the best evidence.

But, however this may be, the defendant had all of the advantage from the testimony offered which it could have had if the particular question referred to had been answered, and hence there was no reversible error in ruling it out.

We come now to consider the exceptions taken by defendant's counsel to the rulings of the court in refusing to instruct the jury as requested by its counsel. The defendant's requests to charge the jury, together with the rulings of the court thereon, were as follows:

"(1) The defendant is not required to have the best telldales. If its telldales are such as are in common use by ordinarily well-managed railroad companies, it has performed its duty in this respect." This request was granted.

"(2) The defendant is not bound to have the best inspection of its telldales, but only such inspection as ordinary railroad companies give to their telldales under like circumstances." This request was refused, and the defendant's exception noted.

"(3) Unless the telldale that caused the death of Mr. McGarrity had been looped up for a sufficient time for the defendant to have become aware of it by such inspection as is given to telldales by ordinary railroad companies in like circumstances, the verdict must be for the defendant." This request was granted.

"(4) If Mr. McGarrity knew, or in the exercise of reasonable care might have known, that telldales were apt to become looped from time to time, he assumed the risk of injury from such looping, and the verdict must be for the defendant." This request was refused, and defendant's exception noted.

"(5) If Mr. McGarrity was told to look out for these telldales, and to untie them when he found them looped up, the verdict must be for the defendant." This request was refused, and defendant's exception noted.

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“(6) If it was customary for the yard brakemen to look out for these telldales and to untie them when they were looped up, the verdict must be for the defendant.” This request was refused, and defendant’s exception noted.

“(7) If the yard brakemen were told to look out for these telldales, and to untie them when they were looped up, their failure to do so is the negligence of a fellow servant, and the verdict must be for the defendant.” This request was refused in these words, and the defendant’s exception noted.

“(8) If Mr. McGarrity knew, or in the exercise of reasonable care might have known, that this telldale had a loop or a half-hitch, the verdict must be for the defendant.” This request was refused, and defendant’s exception noted.

“(9) If the telldale became looped up so short a time before the accident that the defendant could not have discovered it by ordinarily careful inspection, the verdict must be for the defendant.” This request was granted.

Although the second request to charge was substantially correct as a proposition of law, and might properly enough have been granted, yet as the third request which was granted embodies, to all practical intents and purposes, the same identical principle of law contained in the second, and which fully covered the law applicable to the case upon the point then under consideration, the defendant clearly had all which it was entitled to on this point. There was therefore no occasion for the granting of both requests. Repetition of statement is not only unnecessary, but both court and counsel should always seek to avoid it.

The fourth request was properly refused, for several reasons. First. It was incomplete, inasmuch as it omitted one of the vital and essential elements of assumed risk; i. e., knowledge of the danger reasonably to be anticipated from a known defect. *McGar v. Natl. & Prov. Worsted Mills*, 22 R. I. 347, 47 Atl. 1092, and cases cited. See, also, *Pilling v. Narr. Machine Co.*, 19 R. I. 666, 36 Atl. 130.

Another reason why the request should not have been granted is that it fails to take into account the position and exacting duties devolved upon the deceased at the time of the happening of the accident. He was standing on top of a freight car of unusual height, with his back towards the engine, as his duties then required him to stand, so that he could signal to the switchman at the rear of the train when the proper time came for the engine to be reversed, and the cars could be pushed back upon another track. His duty also required him to signal the engineer when the rear car had passed over the switch, so that he would know when to reverse his engine. The telldale, therefore, by which the deceased was caught was behind him; and even if he knew of its condition—of which there is but very slight, if, indeed, it can properly be said that there was any substantial, evidence—it was competent for the jury to find that his duties were so

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engrossing at the time as to take away all thought of danger, especially from an appliance which was not only not dangerous if in proper condition, but was known to be a warning against danger.

As pertinently remarked by the court in its charge to the jury, in speaking of the telltale: "It was not an appliance to assist him in running the train, but to protect him, as well as others, from coming in contact with that bridge. It was placed there to guard those who were upon the cars." See *Darling v. R. R. Co.*, 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643. Even in those cases where the machine or appliance by which one is injured is inherently dangerous or obviously defective, and known to be so by the servant, he is not necessarily precluded from recovering if it appears that the circumstances connected with the discharge of his duties at the time of receiving the injury would naturally divert his attention for the instant from the danger. See *Disano v. Brick Co.*, 20 R. I. 452, 40 Atl. 7; *Baumler v. Brewing Co.*, 23 R. I. 430, 50 Atl. 841, and cases cited; *Mayott v. Norcross Bros.*, 24 R. I. 187, 52 Atl. 894; *Beach on Contrib. Neg.* (2d Ed.) § 40.

The fifth request to charge was properly refused. It does not follow that, if McGarrity was told to look out for these telltales and to untie them when he found them looped up, that the plaintiff was not entitled to recover; for, as just suggested, notwithstanding such a duty might have been imposed upon him by the defendant, which of course would have given him knowledge of the condition of the telltales generally, yet he might not have appreciated the danger arising from the existence of such looping up, and might have been so absorbed in his duties at the time of the accident as not to have had any thought of their condition. Moreover, we fail to find any evidence which shows that the deceased was ever given any such instruction as is contemplated by the fifth request, and hence there was no ground upon which to base it.

The sixth request was rightly refused. A master cannot escape liability for his failure to perform a duty which the law devolves upon him by reason of the fact that it is the habit or custom of his employees to discharge it for him. Indeed, he cannot avoid liability for the neglect of his servant who is expressly delegated by him to discharge such duty; for the negligence of the servant in this regard is the negligence of the master. *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Morgridge v. Tel. Co.*, 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879. And this being so, a fortiori a master cannot avoid his liability for the failure of his servants generally to observe a mere custom or habit of themselves performing his duty for him, where he has chosen to rely upon such a custom or habit.

The seventh request was rightly refused for substantially

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the same reason. The duty to keep the telldales in repair was the duty of the defendant as master, and hence the negligence of any servant of the defendant in the premises was its negligence, and not the negligence of a fellow servant. *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555, 54 Atl. 52.

The eighth request was properly refused. It is practically a repetition of the fourth request, except that it limits the question of the knowledge of the deceased to the particular loop by which he was injured, while the former referred to his knowledge of the condition of the telldales generally. But what we said regarding the fourth request is applicable and controlling here.

Finally, with regard to the requests to charge, we are of the opinion that those which were granted by the court, taken in connection with the charge which had already been given, stated the law applicable to the case with substantial accuracy, and hence that no ground for a new trial is shown in connection therewith.

We cannot say that the verdict is against the evidence. The testimony for the plaintiff shows that the loop by which the plaintiff's intestate was caught was similar to those which were frequently formed by the exhaust from the engines in passing under the telldales. Frank A. Whipple, a freight conductor of long experience, testified that "the exhaust catches the telldales and throws them up in the air, and sometimes they flop together and form a half loop, and sometimes three or four of them get over and hang there." He had seen the engine loop them up times without number. Joseph Miller, a brakeman of 12 years' experience, testified to substantially the same state of facts. Peter Rivard, a brakeman who was present at the time of the accident, and opened the loop after McGarrity had been caught in it, also testified to like effects from the exhaust of the engine. He further testified that such a loop as caused the accident was not made by human hands, and was not a knot formed by tying the ropes together. Roy A. Macomber, another brakeman, who saw this particular loop for a day or two before the accident, testified that it was clearly distinguished from a knot in the telldale made by tying the ropes together by hand. The witness Frank A. Whipple also testified that the loops caused by the exhaust of the engine were clearly different from those tied by brakemen. The following questions and answers illustrate his testimony: "Q. Have you ever seen a looping up of the telldales—a half-hitch made by hand? A. No, sir. Q. What kind of a knot was there in those ends where you saw them tied—a half knot or a whole one? A. Well, it was what we would call a running knot, wound right around and thrown over in that manner (indicates), as you wind your handkerchief and draw it into a sailor knot. Q. Is that the same condition of the knot you describe in the case where you say the more pressure you brought to bear the harder they

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would hug up, where there were bunches on the ends? A. No, sir; the one is a loop and the other that where somebody tied them. I make it very distinct; yes, sir. Q. Then 'tied' means something to you? A. There is a very great difference between a loop and a knot. Q. What is the difference? A. The difference, in my estimation, is this: that a knot could not possibly be made in any other way than the hand of man, and a loop can, for I have seen fifteen times that number. Q. What do you say of a loop—that it was tied? A. No, sir." The brakeman Miller testified that pressure upon any such loop caused it to bind and tighten, and if the ropes had knots or bunches on the ends the loop would hold all the harder. The plaintiff's evidence shows that the loop by which the plaintiff's intestate was caught had existed in the telltale for several days prior to the accident. Charles F. Perry, who was an eyewitness to the accident, frequently saw such loops before the accident. The witness Macomber who was working with one of the crews in said freight yard, saw loops in the telltales before the accident, and saw and touched the loop in question a day or two before the accident. The following questions and answers illustrate his testimony in this regard: "Q. Did you notice them on the day of the accident? A. Yes, sir; I did. Q. Did you notice them the day before? A. Yes, sir; for a week or so before. Q. What did you notice for the week just prior to the accident, every day? A. The way they were looped up. Q. Where were they looped up? A. Right over tracks No. 5 and 7. Q. When you say 'looped up,' what do you mean? A. Tangled up and thrown over one another—part of them are knotted on the end. Q. How many were looped together in that condition over track No. 5? A. I think there were three tied up there and one was looped over—these three made a kind of loop. Q. How was your attention called to it? A. Well, I was working that forenoon, and the back of my head was caught—took the hat off of my head—and when I came by again I pushed them out of my way. I saw they were pretty hard there—stuck together. Q. Did they come apart when you pushed them? A. No, sir. Q. These particular loops that you saw that day, had you noticed them before that day? A. It was the day before that I noticed them." Peter J. Hevey, a young man who crossed the Conant street bridge four times daily, testified that he saw the ropes in the telltales frequently looped there. Gerald De Vere, another eyewitness to the accident, who went down by this bridge and through the freight yard daily, testified that he saw this very loop a day or two before the accident, and called the attention of the yard boss to it at that time. In speaking of the telltale where deceased was caught this witness testified, in referring to the ropes, that "they looked as if they had been thrown over that way—a half knot, what I call. I should say there were three of them; one of them

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was tangled round two of them that way." He also testified that one or two days before he was talking to the boss of the section, and said: "Jim, I think you will have an accident here yet." "Q. What telltale did you call his attention to? A. These ones that were knotted together. Q. What telltales with reference to Mr. McGarrity? A. The same ones. Q. And what was their condition when you called his attention to it? A. The same way. Q. How long before the accident? A. I should say a day or two before the accident. * * * Q. Was there any change made in the telltales from the time you called the attention of the yard master to it to the time of the accident? A. No, sir." The plaintiff also offered testimony to the effect that the ropes in question showed weather marks after the loop was opened; that they did not hang down as they should, straight and at full length, but were drawn up and twisted in a spiral shape. This fact tended to show that the ropes had been looped up for some time. The testimony for the plaintiff also shows, and there is no dispute about this, that the defendant corporation had adopted a system of care and inspection of these telltales in order to prevent the very danger which was the cause of this accident, by providing its track-walkers with a long pole, equipped with an iron hook on the end of it, for the purpose of opening these loops and pulling out these tangles in the telltales as they went by them in the discharge of their duties. Several of the witnesses called by defendant corroborated the testimony offered by plaintiff as to the manner in which the loops in the telltales were formed, and there is practically no dispute that the loop in question was formed in the way above described. It therefore clearly appears that the defendant had full knowledge of the general condition of the telltales long before the accident, and recognized its duty in protecting its employees from danger therefrom; and whether it failed in this regard was a question of fact for the jury to decide under the testimony submitted. Whether the plaintiff was in the exercise of due care at the time of the accident was also a question of fact for the jury to determine under the evidence.

The last ground of the petition for a new trial, viz., that the damages are excessive, was not relied on at the hearing.

Petition for new trial denied, and case remanded for judgment on the verdict.

METROPOLITAN WEST SIDE ELEVATED RY. CO. v. FORTIN.

(*Supreme Court of Illinois, June 16, 1903.*)

[67 N. E. Rep. 977.]

Appeal—Review.

The judgment of the Appellate Court is final as to the facts where there is any evidence tending to support it.

Metropolitan West Side Elev. Ry. Co. v. Fortin**Fellow Servants—Question for Jury.**

Whether servants are fellow servants is, as a general rule, a question for the jury.

Assumption of Risk—Incompetency of Fellow Servant.*

A servant does not assume the risk resulting from the employment of an incompetent fellow servant unless he has notice of such incompetency.

Incompetency of Motorman—Evidence.

Incompetency of a motorman may be shown by proof of his general reputation as to prudence in running motor cars, and by evidence that he had run past signals, had jerked the train he was pulling, and had been laid off and reprimanded by the master for carelessness in the performance of his duties.

Appeal from Appellate Court, First District.

Action by Alfred J. Fortin against the Metropolitan West Side Elevated Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

O. W. Dynes, for appellant.

Gemmill & Foell, for appellee.

HAND, C. J. This is an action on the case brought by the appellee against the appellant to recover damages for a personal injury sustained by him while in its employ. The jury returned a verdict in favor of the appellee for the sum of \$18,000, and, a remittitur of \$3,000 having been entered, the court overruled a motion for a new trial, and rendered judgment on the verdict for \$15,000, which judgment has been affirmed by the branch Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It is first contended that the court erred in declining to take the case from the jury at the close of all the evidence on the ground that the appellee had failed to make a case. The appellee had been in the employ of the appellant for about two years, and for the three months prior to the date of the accident had been employed as a coupler, and at the time of the accident was working in that capacity at its Logan Square terminus. It appears from the undisputed evidence that trains came into said terminus about every six minutes; that on the evening upon which appellee was injured he had uncoupled a motor car from an incoming train, and was then informed by the train dispatcher, who had supervision of the receiving, making up, and sending out of trains, that there was a car in said train in bad order, and for him to uncouple the same, that it might be set out and repaired; that the appellee immediately started to obey the order of the dispatcher, and while between the cars, engaged in uncoupling said car, a motor car was suddenly and violently thrown against the train of which the car that the appellee was uncoupling formed a part, and he was knocked down and run

*See foot-note appended to *Galveston, H. & S. A. Ry. Co. v. Sherwood* (Tex. Civ. App.), 4 R. R. R. 564, 27 Am. & Eng. R. Cas., N. S., 564.

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over; and, while the evidence was conflicting upon the point, it fairly tended to show that the motor was thrown against the train by reason of an order given the motorman by said dispatcher to back down his motor car and connect with the train from which appellee was then uncoupling said car, which order the motorman executed in a reckless and wanton manner. This court cannot weigh the evidence in passing upon the question whether or not the trial court erred in overruling the motion to take the case from the jury at the close of all the evidence. Such motion presents to this court a question of law, and not one of fact, and is in the nature of a demurrer to the evidence; that is, admitting the evidence in favor of the plaintiff to be true, does it, together with all legitimate conclusions which may be drawn therefrom, fairly tend to sustain the plaintiff's cause of action? If it does, then, as a matter of law, the plaintiff is entitled to have his case passed upon by the jury. In *Birdsell Mfg. Co. v. Oglevee*, 187 Ill. 149, 58 N. E. 231, the court, after holding the record contained evidence which fairly tended to support the plaintiff's cause of action, said (page 151, 187 Ill., page 232, 58 N. E.): "Whether this evidence is weak or strong is not a question for this court, as the judgment of the Appellate Court in respect to the facts, where there is any evidence tending to support the judgment, is final, and cannot be reviewed by this court. *Chicago & Alton Railroad Co. v. Kelly*, 127 Ill. 637 [21 N. E. 203]; *Hamburg American Packet Co. v. Gattman*, 127 Ill. 598 [20 N. E. 662]; *Cothran v. Ellis*, 125 Ill. 496 [16 N. E. 646]; *McCormick Machine Co. v. Burandt*, 136 Ill. 170 [26 N. E. 588]; *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 138 Ill. 37 [27 N. E. 450]; *National Syrup Co. v. Carlson*, 155 Ill. 210 [40 N. E. 492]." The court did not err in refusing to take the case from the jury.

It is next contended that the court erred in declining to instruct the jury that the motorman in charge of the motor car which was backed against the train, and appellee, were fellow servants, and that appellee assumed the risk of being injured by the negligence of the motorman. The general rule is that the question whether servants of the same master are fellow servants is a question of fact, to be determined by the jury from a consideration of all the facts and circumstances proven in the particular case, under proper instructions from the court (*Norton Bros. v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842); and there was evidence before the jury fairly tending to prove that the motorman was incompetent and habitually reckless in handling said motor car, which fact was known to the appellant, and not to the appellee. The assumption by the servant of risks resulting from the negligence of his fellow servants is subject to the implied undertaking of the master that he will use all reasonable care to employ competent and prudent employees. When the master fails to employ competent and prudent co-employees,

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the risk resulting from such failure is an extra hazard, and not among the risks which the servant assumes as a part of his contract of service, unless he has notice of such incompetency and recklessness, and, after such notice, assumes such extra hazard by failing to quit the service in which he is employed; and upon entering the employment he has the right to assume that the master has discharged to him his legal duty in selecting competent and prudent co-employees, and may continue to act upon that assumption in the absence of anything putting him upon notice to the contrary; and the question whether he has such notice as would require him to quit the service or assume the extra hazard is a question of fact, to be determined by the jury from all the evidence in the case. In *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162, on page 622, 146 Ill., page 164, 35 N. E., the court said: "Among the risks incident to the business, which the servant is understood to take upon himself by the contract of hiring, are those arising from the careless or wrongful acts of fellow servants. Wood's Law of Master & Servant, § 427. But the assumption by the servant of risks resulting from the negligence of his fellow servants is subject to the implied undertaking of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances, and to employ competent and prudent co-employees. *Pittsburgh, Cincinnati & St. Louis Railway Co. v. Adams*, 105 Ind. 151 [5 N. E. 187]; Wood's Law of Master & Servant, §§ 329, 416. When the master fails to furnish suitable machinery, and to see that it is properly protected, or to employ careful and prudent servants to manage and operate such machinery, the risks resulting from such failure are extra hazardous, and such extra hazards are not among the risks which the employee assumes as a part of his contract of service." And in *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244, on page 486, 151 Ill., page 245, 38 N. E., 42 Am. St. Rep. 244: "It is, however, insisted that the plaintiff is shown to have had the same opportunity to have known of the reckless habit of Cooley that defendant is charged with having, and that the failure to inform himself in respect thereof was negligence so contributing to the injury that no recovery can be had. As already said, the plaintiff, upon entering the employment, had a right to assume that the defendant had discharged its legal duty in selecting his co-employees, and might act upon that assumption, in the absence of anything putting him upon notice to the contrary. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242 [32 N. E. 285; 18 L. R. A. 215]. Whether there was evidence of facts sufficient to put him upon notice, and requiring him to quit the service or assume the extra hazard, was a question of fact." The questions whether or not the motorman and appellee were fellow servants, and whether the extra hazard of being injured by the incompetency or recklessness of the

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motorman was assumed by the appellee, were questions of fact, and properly left to the jury. The instructions above referred to, if given, would have invaded the province of the jury, and were properly refused.

It is further contended that the court erred in permitting the appellee to introduce proof that the general reputation of the motorman as to prudence and carefulness in running and managing said motor car was bad; that he had run past signals, had jerked the train he was pulling, and had been laid off and reprimanded by the appellant for the careless and reckless manner in which he had performed his duties as motorman while in its employ; and it is urged that the proof of his reckless and careless conduct should have been confined to the method in which he performed acts similar to those complained of at the time of said injury. This objection is without force. In *Western Stone Co. v. Whalen*, 151 Ill., on page 482, 38 N. E. 243, 42 Am. St. Rep. 244, it was said: "The plaintiff, for the purpose of carrying knowledge home to the defendant of the incompetency and reckless character of the person they had employed as captain of their towing vessel, offered proof tending to show the general reputation of said captain as to prudence and carefulness in running and managing the steamboat, and that such general reputation was bad. * * * Where an injury has occurred through the incompetency, recklessness, or unskillfulness of a servant who was generally known and reputed to be unfit, reckless, or unskillful, evidence of the fact that he was generally so reputed is competent, as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment, could and ought to have known of his unfitness, want of skill, or reckless habit." And in *Consolidated Coal Co. v. Seniger*, 179 Ill. 370, 53 N. E. 733, where the admissibility of evidence similar to that objected to here was under consideration, the court said (page 373, 179 Ill., page 734, 53 N. E.): "Various witnesses were asked by plaintiff's counsel as to what the manner of the engineer was in handling the cage, or letting men down or bringing them up from the mine, and answers were given against objection of defendant. * * * If we understand counsel, the claim is, first, that the incompetency of the engineer could only be shown by a general bad reputation for incompetency; and, secondly, that the fact of incompetency could not be proved by his conduct, because it contradicted his certificate of competency given him by the State Board of Mine Examiners. We do not think the evidence incompetent on either ground. It is true that a competent engineer may be negligent on a particular occasion, and not be above the ordinary frailties of human nature, and that incompetency is not shown by some particular act of negligence; and yet one who knows how to run and handle an engine properly, and who has the physical strength to do so, cannot be said to be competent for the

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position of engineer if he is habitually imprudent, careless, and reckless. One is incompetent who is wanting in the requisite qualifications for the business intrusted to him. Rasor was incompetent for the business of engineer, if he was wanting in the qualifications required for the performance of the service, whether arising out of a lack of knowledge or capacity, or through imprudence, indolence, or habitual carelessness; and evidence which tended to bring before the jury his particular qualities in that respect, and to show his fitness or unfitness for the position of engineer, was competent." The jury were justified, from the evidence in this case, in finding that while the appellee was between the cars, uncoupling the disabled car, pursuant to the order of the train dispatcher, said dispatcher, without warning to the appellee, ordered the motorman to back down and attach his motor car to the train of which the car being uncoupled formed a part, without notifying the motorman of the then situation of appellee, and that said motorman, in obedience to said order, but in a careless and reckless manner, and with great force and violence, threw said motor car against the train, the result of which was that appellee was knocked down and run over, and his left arm and leg so crushed and mangled that amputation thereof was necessary.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

SNYDER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 4, 1903.)

[55 Atl. Rep. 778.]

Death of Employee—Negligence of Fellow Servant.

Evidence in an action to recover for the death of a locomotive fireman killed by the derailling of the locomotive examined, and *held* to show that the negligence of the engineer, and not the failure to have air brakes on the train, was the cause of the injury.

Same—Locomotive Derailed by Cattle—Failure to Fence Track.*

Act April 9, 1868 (P. L. 779), requiring railroads in a certain county to fence their right of way, and imposing a penalty on railroads failing to so fence where cattle are injured by such failure, does not affect the liability of the railroad for injuries to an employee, caused by a locomotive being derailed by cattle on the track at a part of the track which the railroad company had neglected to fence.

*Liability for injury to employee as affected by violation of statutes requiring track to be fenced, see note appended to *Goodrich v. Kansas City, etc., Ry. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 137.

As to the liability for injuries to children as affected by failure to fence track, see foot-note appended to *Fezler v. Willmar & S. F. Ry. Co. (Minn.)*, 1 R. R. R. 174, 24 Am. & Eng. R. Cas., N. S., 174; note appended to *Nickolson v. Northern Pac. Ry. Co. (Minn.)*, 18 Am. & Eng. R. Cas., N. S., 682; *Marengo v. Great Northern Ry. Co. (Minn.)*, 23 Am. & Eng. R. Cas., N. S., 660; *Rosse v. St. Paul & D. Ry. Co. (Minn.)*, 7 Am. & Eng. R. Cas., N. S., 351.

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Appeal from Court of Common Pleas, Centre County.

Action by Minerva B. Snyder against the Pennsylvania Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas J. Sexton, A. O. Furst, and James A. B. Miller, for appellant.

Edmund Blanchard and John Blanchard, for appellee.

PER CURIAM. David W. Snyder was a fireman in the employ of defendant company. On October 21, 1900, he was serving as a fireman on a locomotive drawing a train on the Bald Eagle Valley Branch of defendant's road between Lock Haven and Tyrone. The train left Rock Haven about 12 o'clock noon on Sunday, the day above noted, reaching a point near Howard's Station in about an hour, where it ran over two cattle upon the track. The locomotive dragged the cattle about 160 feet when it left the track and was wrecked. Snyder was killed. His widow brings this suit for damages, averring that the negligence of defendant caused his death: (1) In that it had not, although engaged in interstate commerce, equipped its cars with automatic air brakes, as prescribed by the act of Congress of March 2, 1893, c. 196, § 5, 27 Stat. 531. (2) In that it had neglected to fence and maintain fences along the line of the road where the accident occurred, as provided by the special act of Pennsylvania of April 9, 1868 (P. L. 779).

It is argued that, if defendant had complied with the requirements of the act of Congress as to air brakes, the train could have been stopped after the cattle were seen; or, if it had complied with the special act requiring the fencing of the track they would not have been upon it. The learned trial judge was of the opinion that the accident was caused by the negligence of the locomotive engineer on whose engine Snyder was serving as fireman. He states the facts from the evidence thus: "The train was moving at a rate of about sixteen miles an hour—not an unusual rate of speed—and was under the control of the engineer and engine. The engineer's attention had been called to the cattle alongside the track some distance before he came to them. He took no measure to check the speed of the train in case of any probable collision with the cattle. He ran on relying on the uncertain instinctive action of the cattle, rather than exercise a proper precaution provided the uncertain instinctive action of the cattle should differ from his judgment as to what they would likely do." He is of opinion, therefore, that on the undisputed facts the equipment of the cars with the air brake could not have prevented the accident, or, rather, that the absence of such equipment in no way contributed to it, and therefore that negligence in that particular cannot be imputed to defendant so as to fix a liability in this case.

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Further, as to neglect to fence, there was evidence that the fence along the track was out of repair. It was not in such condition as would exclude cattle from the track. The act, as before stated, is a special act, only applicable to this railroad in Centre county. The penalty for its nonobservance shows plainly its purpose, thus: "And in case any company owning or operating said road or roads shall refuse or neglect to perform the duties herein imposed, the company or companies so offending shall be answerable to the owner or owners of any horses, cattle, sheep or swine, to the full value of such property injured upon such road, in consequence of such neglect." The court was of opinion that this act imposed no other penalty than payment by the railroad company for the cattle injured; that it did not go further, and by implication impose a penalty for damages to third persons, occasioned by neglect to maintain fences. On this view of the law he directed a nonsuit, and we have this appeal by plaintiff.

We decline at this time to pass any opinion on the effect of the act of Congress requiring air brakes upon cars of railroads engaged in interstate commerce, because such opinion is not necessary. Whether the Constitution of the United States authorizing Congress to regulate interstate commerce extends so far as to compel the adoption of an air brake on traffic wholly within the state carried on in obedience to its charter and strictly within state laws, may become a question where the cause of the accident is attributable to a neglect of the provisions of the act of Congress. But that is not this case. Under the facts here, the absence of the automatic air brake was in no sense the cause of the accident, and consequently has no part in the decision of the cause.

As to the special act requiring fencing, there is no doubt, on the authorities cited, that in those states having general laws requiring all railroads to fence their right of way a very different degree of responsibility would be imposed, because there the fencing is required for the protection of the general public from injury; but here the special act is to provide for the payment to the owner of cattle his loss from neglect to fence. As was aptly said in *Carper v. Receivers of Norfolk & Western Railroad Co.*, 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135, as to a Virginia statute: "So far as the owner of stock is concerned, the remedy is plain and adequate. Had the Legislature intended to provide an additional liability on railroad companies for injuries to persons brought about by the failure of such companies to construct fences at the places designated in the statute, it would certainly, concerning a matter of such universal importance, have used apt and unequivocal language."

There is nothing in any of the assignments of error requiring further notice. They are all overruled, and the judgment is affirmed.

PENNSYLVANIA CO. v. FISHACK.*(Circuit Court of Appeals, Sixth Circuit, July 1, 1903.)*

[123 Fed. Rep. 465.]

Master and Servant—Operation of Railroad—Duty of Company.

A railroad company owes a positive duty to its employees with respect to the construction and maintenance in proper repair of its tracks, cars, and other appliances, but with respect to the operation of the road its duty extends no further than to exercise ordinary care to provide a sufficient number of reasonably competent employees, make proper rules for their government, and to exercise proper supervision over them. When that has been done, it is not liable for an injury to an employee in the operation of the road, through the negligence of other employees in the operating department or their failure to observe the rules.

Same—Liability for Injury of Employee.

A railroad company is not liable for the injury of a fireman on a switch engine through a collision at night with cars standing on a switch track, brought about by an erroneous statement by the yard master that the track was clear.

Same—Fellow Servants—Yard Master and Fireman of Switch Engine.*

A yard master in charge of switch yards of a railroad, who is subordinate to a general yard master, who is in turn subordinate to a train master, and he to a superintendent, is not a vice principal, but a fellow servant, in his relation to other employees engaged in switching in the yard.

Same—Rule Governing.

In the absence of a governing statute of the state, where an injury was received, a federal court will apply the general rule of such courts in determining who are fellow servants, regardless of where the contract of employment was made.

Same—Action for Injury—Pleading.

Where, in an action by an employee against a railroad company to recover for an injury, plaintiff alleged that the order resulting in the injury was given by defendant's superintendent or train dispatcher, which allegation was denied, it was competent for defendant to prove, under such denial, that the order was given by a yard master, and to rely on the fact that he was a fellow servant with plaintiff, without pleading such fact.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This action was brought by defendant in error against plaintiff in error in the common pleas court of Richland county, Ohio, from whence it was removed to the lower court, to recover damages for a personal injury sustained by him

*As to whether a yard master or road master is the fellow servant of trainmen, see note appended to *O'Neill v. Great Northern Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 415; *Farquhar v. Alabama & V. R. Co.* (Miss.), 20 Am. & Eng. R. Cas., N. S., 538.

As to what is the criterion of fellow service, see notes, 12 Am. & Eng. R. Cas., N. S., 684; 16 Am. & Eng. R. Cas., N. S., 570; 20 Am. & Eng. R. Cas., N. S., 491; *Kerner v. Baltimore & O. S. W. Ry. Co.* (Ind.), 9 Am. & Eng. R. Cas., N. S., 328; *Norfolk & W. R. Co. v. Houchins* (Va.), 8 Am. & Eng. R. Cas., N. S., 616.

As to the different department limitations of the fellow-servant rule, see monograph appended to *Louisville & N. R. Co. v. Stuber* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 840; *Louisville & N. R. Co. v. Edmonda* (Ky.), 23 Am. & Eng. R. Cas., N. S., 481.

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whilst in its employ as a fireman on one of its yard engines. The injury was quite serious, and he obtained a verdict and judgment for the sum of \$15,000. His regular employment was not in the yard, but out on the road. On the night of November 18, 1900, by direction of defendant, he acted as fireman on the head engine of two yard engines engaged in transferring a train of 39 freight cars from what is termed the outer depot on defendant's road west of Allegheny river, across that river, and thence north to Twentieth street, in the city of Pittsburg, a street running at right angles to the river. The eastern end of the bridge across said river lies between Tenth and Eleventh streets, in said city, and the territory lying between those streets and west of Penn avenue, which runs parallel to the river, is known as the Penn street yard of defendant. Defendant's railroad extends no further north than Eleventh street. At that point it connects with the railroad of the Allegheny Valley Railway Company, and the territory from thence to Twentieth street, the destination of said train, is known as the Twentieth street yard of said railway company. From a point just north of Sixteenth street in said yard there are two tracks extending northwards past Twentieth street, connected there by means of a switch. One of them is known as the main track, and the other as track No. 1. No switchman is stationed at the switch, and it is manipulated by the trainmen of passing trains. At night a lamp is used to indicate which track is open, red indicating No. 1 and white the main track. Between Sixteenth and Seventeenth streets, in the course of track No. 1, is a sharp reverse curve between buildings close to the track on each side. On the night in question a train of freight cars was stationed at or near the north end of this curve.

The Allegheny Valley Railway Company had a yard master in charge of said Twentieth street yard, stationed at Twentieth street, and the defendant had a yard master with a clerk in charge of said Penn street yard, stationed at the eastern end of said bridge. He was subject to a general yard master, who had charge of all defendant's yards between Union Station, in Pittsburg, and Jack's Run, Allegheny; he, in turn, to a train master; and he, in turn, to a superintendent. The stations of the two yard masters referred to were connected by telephone. By an order of said railway company it had been provided that the movement of trains between Eleventh and Twenty-Eighth streets should be under the direction of the yard master at Twentieth street; and, further, that north-bound trains should come to a full stop 100 feet south of Sixteenth street crossing, and should not proceed without sending a flagman around the curve between Sixteenth and Seventeenth streets, hereinbefore referred to. A copy of this order had been posted on the conductor's bulletin board in said Penn street yard and elsewhere by defendant prior to said night since 1896 or 1897.

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The freight cars in the train upon which plaintiff was then acting as fireman were being transferred, as stated, in order to be delivered by defendant to said railway company. When it reached the eastern side of the bridge it stopped, and the engineers and conductor thereof were directed by one Miller, a yard conductor, who on that occasion was acting as defendant's night yard master, in charge of said Penn street yard, to proceed by way of said track No. 1 to Twentieth street. There was evidence tending to show that he said that it was all right to proceed by said track, and that everything was clear.

Before giving this direction he communicated with the yard master at Twentieth street through his clerk, and was told to order the train to take said track. Being thus directed, the train proceeded on its course. The requirement as to stopping the train and sending a flagman around the curve was not complied with. The lamp at the switch showed red, thereby indicating that track No. 1 was open, and the train proceeded along said track until it collided with the cars standing thereon, as hereinbefore stated. By reason of the curve and buildings, the cars could not have been seen in time to prevent the collision. It was this collision that caused the injury complained of, and it happened shortly after midnight, on the morning of November 19th.

Amongst other errors assigned for reversal is the refusal of the lower court to give a peremptory instruction to find for defendant, requested at the close of all the evidence.

J. R. Carey, for plaintiff in error.

W. S. Kerr and C. H. Workman, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

This case really presents a question as to the liability of a railroad company for an injury to one of its employees on one of its trains whilst being operated by its employees upon the railroad of another company, under some traffic arrangement, occasioned by a collision between it and cars stationed thereon. But, as stated in his petition, plaintiff's case was as if his injury had been received whilst the train was being operated on defendant's own road. No reference is made therein to the railroad, cars, or employees of any other company as having any connection therewith. And the lower court refused to permit certain of defendant's witnesses to testify as to the connection of the railroad, cars, or employees of the Allegheny Valley Railway Company therewith upon the idea that it had not been affirmatively pleaded. All the allegations of the petition, however, except as to the defendant's corporate existence and operation as lessee of the Pittsburgh, Fort Wayne & Chicago Railroad through the state of

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Ohio and into the state of Pennsylvania, and as to plaintiff being in its employ and injured on the night in question, in the city of Pittsburg, were denied by the answer. Under this denial defendant was entitled to prove the connection of said railroad, cars, and employees therewith, because the same was inconsistent with the allegations of the petition as to how the injury had been caused. But no point is here made of this action of the lower court, inasmuch as the facts, substantially as we have set them forth in the foregoing statement, appeared from the testimony of plaintiff's witnesses and that of defendant's, which was permitted to go to the jury. Neither is it necessary to consider the question whether there was a variance between the allegations of the petition and the proof; for we are of the opinion that the defendant was entitled to the peremptory instruction asked for by it upon the merits of the question, for the reasons hereinafter stated. Nor will we take further notice of the fact that the injury was received on the railroad of the Allegheny Valley Railway Company or the relation of its employees thereto, because there is nothing in these circumstances to affect the disposition of this case. It will be disposed of the same as if the injury had been received on defendant's railroad, and none but its employees were connected therewith.

The negligence complained of in the petition was the failure to have a switchman at the switch connecting the main track and track No. 1; the direction given to the engineers and conductor to proceed along track No. 1, whilst it was so obstructed, which direction, it was alleged, was given by defendant's superintendent, train dispatcher, or other of its employees under whose orders and directions its trains and the train upon which plaintiff was employed were operated; and the allowing said cars to stand upon track No. 1 and obstruct it.

The lower court instructed the jury that there was no liability on defendant's part because of the failure to have a switchman at the switch, as that failure was not the proximate cause of the injury; and, further, that, if they believed from the evidence that the failure of the engineers and conductor to obey a rule of the company requiring the train to come to a stop and a flagman to be sent ahead was the proximate cause of plaintiff's injury, the defendant was not liable, because the engineers and conductor were fellow servants of plaintiff. On the other hand, the jury were told that if the yard master at Penn street yard, in giving the order to take track No. 1, represented that the track was clear, the defendant was liable. In the course of the charge it was said:

"The fault complained of by the plaintiff in this case is that the yard master on the night in question, in the performance of his duty, or in the line of his duty, told the conductor,

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or conveyed the information to the conductor and engineer, those in charge of this train upon which plaintiff was employed, to the effect that the train should take No. 1 track, and that it was open. There is testimony tending to prove that the business of the yard master was to direct the position and movement of cars and trains throughout certain territory. It was necessary that he give orders, or rather directions than orders—information rather than orders—as to the condition of cars upon these various tracks. It is claimed by the plaintiff that upon this occasion he stated that the track No. 1 was clear. Now, the performance of the duties in that regard, indicating whether a track was clear or not, was one of the means employed by the railroad company to keep its place of work for its employees safe; and if there was misdirection, if there was a statement upon the part of the yard master that the track was clear, when, as a matter of fact, it was not clear, to go onto the track, and collide with anything upon the track, and injure the plaintiff, then there would be a liability shown by the plaintiff of the railroad company with respect to the injuries that were suffered."

And again:

"It is claimed by the defendant here that the yard master who gave the order, as it is called, or who made the representation upon this occasion that No. 1 track was clear, was a fellow servant of this plaintiff, and that therefore the injury received by the plaintiff arose from the fault and negligence of the fellow servant, and as a consequence the plaintiff cannot recover. I say to you, as a matter of law, that the yard master, with respect of representations as to the openness or clearness of the track, was not a fellow servant of the plaintiff."

This portion of the charge upon which the case hinged was based upon the idea that the duty of a railroad company to its employees to use due care to see that its tracks are reasonably safe is without limitation, and it is only upon such a view of such duty that it can be claimed that defendant was liable for the injury complained of. Otherwise the yard master was the fellow servant of plaintiff, and defendant was entitled to the peremptory instruction asked and refused. There is, however, a limitation upon such duty of a railroad company, and it is this: So far as safety depends upon the manner of construction and maintenance of the tracks, the duty is upon the railway company to use due care to see that they are reasonably safe. In connection with the operation of trains thereon, it is its duty to use due care to employ an adequate force of hands, reasonably competent to operate them, to promulgate adequate rules and regulations for their conduct, and to exercise an adequate supervision over it; but its duty here goes no further. The duty of complying with the rules and regulations which have been promulgated and of carefully operating the trains is a duty incumbent upon those

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employees to whom their operation has been intrusted. All employees so engaged are fellow servants, and no recovery can be had against the railway company for an injury sustained by one of such employees due to the negligence of another. If the law were not as thus stated, in every collision between two trains those employees receiving injury who were not in fault would be entitled to recover against the railway company because of the negligence of those employees who were in fault. That such is the law has been laid down in a number of cases. In the case of *Howard v. Denver & R. G. Ry. Co.* (C. C.) 26 Fed. 837, Judge Brewer said:

"The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employees. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employee of the machinery shall create danger."

In that case he held that no recovery could be had for the death of a fireman on a passenger train caused by collision with an engine running light, due to the negligence of the engineer thereof.

In the case of *St. Louis, I. M. & S. Ry. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833, Judge Sanborn said:

"The line of demarcation between the absolute duty of the master and the duty of the servant is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in safe location, or keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance. The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish sound and a reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but when this duty is performed the duty rests upon the servants to operate it carefully."

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And again:

"The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?"

In that case the Circuit Court of Appeals, Eighth Circuit, held that no recovery could be had for the death of a fireman on a passenger train caused by the negligence of the conductor of a construction train in leaving open a switch which it was his duty to close.

In the case of *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 339, 17 Sup. Ct. 603, 41 L. Ed. 1051, it was held that no recovery could be had by a laborer on a hand car injured by the negligence of a section foreman in charge of the car and the conductor and hands on a work train. In the course of his opinion Mr. Justice Peckham said:

"The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman under whose orders he was placed to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman failed to do so it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper mode of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train and to give the proper warning, so that the car might be taken from the track, was not the neglect of any duty which as master it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south."

And in the recent case of *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100, 52 C. C. A. 58, 57 L. R. A. 712, Judge Sanborn said:

"It is the duty of the railroad company to use ordinary care to furnish a reasonably safe railroad machine; to exercise reasonable diligence to keep it in repair; to use ordinary care to

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employ a sufficient number of reasonably competent servants to operate it; to establish reasonable rules for, and to exercise proper supervision of, its operation. But when this duty is performed an equally positive duty rests upon the servants to keep the great machine from becoming dangerous by their operation of it, and to work it with reasonable care."

In that case the Circuit Court of Appeals, Eighth Circuit, held that no recovery could be had for the death of a foreman of a switch crew of the defendant, in charge of a train composed of an engine, tender, and caboose backing in the nighttime through the yard of the St. Paul Union Depot Company, stationed on the forward end of the caboose as it backed in the darkness, and whose death was caused by the train colliding with a refrigerator car standing on a transfer track of the company called a "dead track," which the train took instead of going around it, because the switch lights were green, thereby indicating that the dead track was clear.

The principle announced and applied in these cases is reasonable, and it is incumbent on us to follow them, and apply that principle to this case, if applicable to it. Here what rendered the track unsafe was the presence on track No. 1 of the cars with which plaintiff's train collided, left there presumably by some employee or employees connected with the operation of trains thereon, and the engineers and conductor of his train were led to take that track because of the direction of the yard master at Twentieth street, who had charge of the yard where it was located, communicated through the yard master at Penn street yard, and of the assurance of the latter, according to plaintiff's contention, that said track was open and clear. No complaint is made of any lack of care in constructing or maintaining the track at the place of injury. The sole complaint is of lack of care in permitting the cars to be there, and in directing plaintiff's train to go there with the representation that the track was clear. This lack of care was in the operation of the railroad. The employees guilty of it were employees connected with the operation thereof. They were fellow servants, therefore, of plaintiff in this matter, and no recovery can be had for the injury he received because of their negligence.

It is urged by counsel for plaintiff that the yard master should be held to have been a vice principal and not a fellow servant of plaintiff, on the ground that he was the head of a great department of the defendant, under the holding in the case of *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, that a head of such a department of a railroad company is a vice principal, and not a fellow servant of the employees subject to him. Their line of reasoning is this: It has been held that a train dispatcher is a vice principal, as the head of a great department. A yard master may be said to be a train dispatcher in relation to the trains being operated in his yard, inasmuch as he has control

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of their running therein. The decisions are not uniform that a train dispatcher is a vice principal within the Baugh Case, though the decided weight of authority is to that effect. 3 Elliott on Railroads, § 1322. This court has held that he is. B. & O. R. R. Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952; Felton v. Harbeson, 104 Fed. 737, 44 C. C. A. 188.

But the likeness between the train dispatcher and the yard-master in the matter of having direction of the running of trains, in so far as it exists, is not sufficient of itself to justify classing the latter with the former as a vice principal. And this court has so held in the case of Cincinnati, N. O. & T. P. Ry. Co. v. Gray, 101 Fed. 623, 41 C. C. A. 535, 50 L. R. A. 47.

In the case of Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 97 Fed. 245, which was the former case in the lower court, Judge Taft said:

"The master found that the yard master was a vice principal. I cannot agree in this conclusion. It is true that the evidence shows that the yard master had complete control of the yard; he was made responsible for its condition; that he was authorized to employ and discharge men; and that he directed the incoming and starting of trains. I do not think, however, that under the principles laid down in the Baugh Case, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, this would put him at the head of one of the departments of the railroad. The nature of his duties was not at all unlike that of a station agent, only that he had more men under him. He was subject to the orders of the superintendent, whose office was at the station in Somerset. He was subordinate to the trainmaster. It would serve no good purpose to discuss at length or restate the grounds of the rule which must control the federal courts in determining the question whether an employee is a fellow servant or not. They have been laid down with elaboration in the Baugh Case, already referred to, and have been reaffirmed from time to time by the Supreme Court in numerous cases. Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; Railroad Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. In Grady v. Railway Co., 34 C. C. A. 494, 92 Fed. 491, decided by the Court of Appeals of this circuit March 7, 1899, it was held that the foreman in charge of the freight-car repair shops, the immediate subordinate of the master car builder, who had control of the work of car repairs—a branch of the mechanical department of the road, at the head of which was the master mechanic—was a fellow servant of the workman, who, it was charged, was injured through his negligence. In that case the court said: 'The Baugh Case has set such limits to the vice principal doctrine

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that it is exceedingly difficult to suggest a position outside of those of the superintendents or acting superintendents of the various great departments of the road the incumbent of which is not to be regarded as a fellow servant of all the other employees. The Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, it is said, has never been expressly overruled. This is true, but it has been so limited to its peculiar facts as to make it of no force as authority in any case where those facts are not exactly presented.' "

The railway company was held liable in that case notwithstanding the fact that the yard master was decided to be a fellow servant of the employee who was injured, because the company had not given proper instructions as to the use of an automatic switch which was the cause of the injury.

It is suggested by counsel for plaintiff that the question as to whether the yard master was the fellow servant of plaintiff is to be determined by section 3 of the Ohio statute passed April 2, 1890 (87 O. L. 149), in relation to fellow servants, because it appeared from the evidence that the contract of employment of the plaintiff was made in Ohio. The point is not well taken. The accident happened in the state of Pennsylvania, and in the absence of a statute there the federal rule in relation to law of fellow servants must be applied. *N. N. & M. V. Ry. Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362; *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

It is further suggested by said counsel that advantage cannot be taken of the fact that the yard master was a fellow servant of plaintiff, because it was not pleaded by defendant that he was. But it was not necessary for defendant to so plead, even if it be true that in any case it is necessary for a master when sued for injury caused by the negligence of its servants to do so. Here the plaintiff alleged that the order complained of had been given by defendant's superintendent, train dispatcher, or other of its employees under whose orders and directions its trains and the train upon which plaintiff was employed were operated. The petition, if non-demurrable, was so because this allegation should be treated as amounting to an allegation that the order had been given by the head of a great department of defendant, within the meaning of the Baugh Case. It was denied and put in issue by defendant. Under this denial, it was entitled to show that the order was not given by the head of such a department, but by the yard master, a fellow servant of plaintiff.

Our conclusion, therefore, is that the judgment of the lower court should be reversed for the error in refusing to give the peremptory instructions requested at the close of all evidence, and the case is remanded for proceedings consistent with this opinion.

BODIE v. CHARLESTON & W. C. Ry. Co.*(Supreme Court of South Carolina, April 20, 1903.)*

[44 S. E. Rep. 943.]

New Trial.

A new trial may be granted where the damages are insufficient.

Injury to Employee—Evidence.

In an action by an employee against a railroad for injuries received while loading rails, it is competent to show the usual method of defendants and other roads of doing the work.

Same—View by Jury.

It is not error for the court to refuse to allow the jury to visit the place of the accident, on their informing him that a view of the place would be of no use.

Same—Objection to Evidence.

In an action for injuries to an employee, an objection to the admission of evidence, failing to state in what particular the testimony was inadmissible, is too general for consideration.

Instructions.

Where defendant requires a further explanation of the principle stated in the instruction, it should prepare a request to that effect.

Injury to Employee—Appliances—Care Required of Master.

An instruction, in an action for injuries to a servant, that defendant should adopt such appliances as were suitable to the work which it required plaintiff to do, with a reasonable degree of safety, and that it was the duty of the defendant to exercise due care to ascertain whether the appliances were safe and suitable, was proper.

Same—Fellow Servant—Concurrent Negligence.*

If plaintiff was injured by an accident resulting from the concurrent negligence of a fellow servant and of defendant, defendant is liable, as though he was the sole offender.

Same—Liability—Proximate Cause—Instructions.

An instruction in an action for injury to servant that the jury cannot find for plaintiff unless the preponderance of the evidence shows negligence of defendant, which was the proximate cause of the injury, was properly modified by making defendant liable whether the alleged injury could have and ought to have been foreseen or not.

Same—Negligence—Instructions.

An instruction undertaking to say what facts would constitute negligence on the part of defendant in an action for personal injuries is properly refused.

Same—Defenses—Insufficient Force.

In an action by a section foreman against a master for personal injuries caused by an attempt to perform work with insufficient hands, such fact is no defense.

Appeal—Review.

Where there is evidence to sustain a verdict, a refusal to set it aside will not be disturbed.

Pope, C. J., dissenting

*See foot-note appended to *St. Louis, etc., Ry. Co. v. Robertson* (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78; *Fluhrer v. Lake Shore & M. S. R. Co.* (Mich.), 17 Am. & Eng. R. Cas., N. S., 463; *Felton v. Harbeson* (C. C. A.), 20 Am. & Eng. R. Cas., N. S., 131.

Railroad company's liability for injury to employee of another company as affected by concurring negligence of fellow servant, see note appended to *St. Louis Nat. Stock Yards v. Godfrey* (Ill.), 7 R. R. R. 28, 30 Am. & Eng. R. Cas., N. S., 28.

Bodie v. Charleston & W. C. Ry. Co

Appeal from Circuit Court, Greenwood County; McCullough, Special Judge.

Action by Josiah W. Bodie against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant appeals on the following exceptions:

“(1) The defendant excepts to and appeals from the order or judgment of Judge Gary setting aside the verdict rendered on the trial before him and granting a new trial, on the ground that the circuit judge did not have the power to grant such new trial for inadequacy of the amount of the verdict rendered, and it was error of law for him to do so.

“(2) The defendant excepts to the rulings of Honorable Joseph A. McCullough, Presiding Judge, in relation to the introduction of testimony, and alleges error in such rulings as follows: (a) In allowing the plaintiff, Bodie, to testify, against the objection of the defendant, as to what was the usual and customary way of handling and loading rails, and that the manner in which he was handling rails when he was injured was the usual and customary manner; the testimony being as follows: ‘Q. What is the usual and ordinary way? Mr. Grier: We object to that, also, as incompetent. (Objection overruled.) A. Just like I was handling them.’ The error being that the circuit judge by his ruling allowed testimony as to the usual and customary method of handling rails, upon the question of plaintiff’s ordinary care in handling such rails when he was injured. (b) In allowing the witness Bodie to testify that the method he adopted for handling these rails was usual and customary on the C. & W. C. Railroad, as follows: ‘Q. What has been the method adopted on the C. & W. C. Railway? Mr. Grier: We object to that as incompetent. (Objection overruled.) Q. What has been the custom adopted there? A. The customary way of loading rails was to load it the way I spoke of just a few minutes ago—both ends at a time. We usually, in loading, loaded in no other way.’ The error being in allowing testimony as to the custom of other agents and employees of this defendant in handling rails, upon the question of ordinary care of the plaintiff in handling rails when he was injured. (c) In allowing the witness W. D. Melton to testify what was the customary way of loading rails on a push car of the Central of Georgia Railroad and other roads, the testimony being as follows: ‘Q. What road did you work on? A. I worked for the Central of Georgia. Q. Did you work for the C. & W. C.? A. Well, that was part of that road at that time. Q. What is the usual and customary way of loading rails on a push car? (We object to that on the ground of incompetency. Objection overruled.) Q. What is the usual and customary way of loading rails on a push car? A. Pick it up and carry it and load it on the car. Q. One end at a time, or altogether? A. I never have picked up one end at a

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time. I just picked up the whole rail and carried it and loaded it on the car. Q. What is the usual and customary way? Was it ever done any other way? A. Always saw it that way.' The error being in allowing testimony as to the custom on other railroads or on this road in handling rails, upon the question of ordinary care of the plaintiff in handling rails when he was injured. (d) In allowing the witness P. W. Ellenberg to testify as to the usual and customary manner of handling rails, in answer to the following questions, to wit: 'Q. What is the usual and customary manner of handling rail? Do you know how it is done? What is the customary way?' The error being in allowing testimony as to the custom on other roads or on this road in handling rails upon the question of ordinary care of the plaintiff in handling rails when he was injured. (e) In allowing the witness J. B. Ogilvie, on cross-examination, to testify that a larger force of hands would have been safer in this case, because such force would be able to catch and hold up a falling rail if one hand should slip. The error being that there was no such negligence alleged in the complaint, and such testimony was therefore incompetent.

"(3) The presiding judge, Hon. Joseph A. McCullough, erred in not requiring the jury to visit the place of the injury, after having ruled, in defendant's favor, and against the objection of plaintiff, that they should do so, and in allowing the jury to determine this question for themselves. The error being: (a) Having decided that it was necessary to a just decision of the cause for the jury to visit such place, it was error of law for the circuit judge to subsequently allow the jury to determine the question whether they would so view the place, or not, for themselves. (b) Because the record shows that it was necessary to a just decision of this cause for the jury to view the place of injury, and, the circuit judge having so held, it was error of law for him to allow the jury to have any voice in determining this question.

"(4) The presiding judge, Hon. J. A. McCullough, erred in charging the jury as follows: 'If you conclude that defendant did not require the plaintiff to do this extra work, but the plaintiff did so freely, voluntarily, of his own motion, without being required by the defendant so to do, why, then, of course, under the complaint, the plaintiff would not be entitled to recover, because he bases his action upon that theory. If, however, you conclude that the defendant did require the plaintiff to do this extra work, then there immediately followed a duty and obligation which the law imposes upon the defendant railway company, and that is that the defendant railway company would furnish to the plaintiff suitable, safe and appropriate appliances for the purpose of doing that work.' The error being that his honor assumed as a fact in the case that the work in which the plaintiff was engaged when injured was extra work, when it was one of the

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issuable facts in the case whether such work was extra, or was a part of and a mere incident to the general work of keeping up roadbed, which had been committed to the plaintiff; thus charging upon the facts, in violation of the provision of the Constitution which prohibits such a charge.

“(5) The presiding judge, Hon. J. A. McCullough, erred in charging the jury as follows: ‘That it was the duty of the defendant to adopt and use such machinery, apparatus, appliances, tools, and means as were suitable and proper for the prosecution of the business which it required the plaintiff to do, with a reasonable degree of safety to life and security against injury, and it was the duty of the defendant, and not the plaintiff, to exercise due care and diligence to ascertain whether the appliances furnished were safe and suitable.’ The error being: (a) That while in some cases the employee may assume that machinery given him to work with is safe and suitable, and he is not bound to inquire whether it is so or not, such principle does not apply to this case, where the alleged negligence was in failing to furnish a sufficient force of hands, and the inefficiency, if it existed, was patent, and particularly where the plaintiff himself was in control of the instrumentalities given him for his work, and in some measure stood in the position of master with reference thereto. (b) In all cases it is the duty of an employee to exercise due care in and about the work committed to him, and it was error of law for the judge to instruct the jury that it was not the duty of the plaintiff to exercise due care and diligence to ascertain whether the appliances furnished were safe and suitable. (c) The doctrine stated was not applicable to this case, and was error of law, for the further reason that the uncontradicted testimony of the plaintiff showed that he had full knowledge some time before his injury of the alleged insufficiency of the force committed to him.

“(6) The presiding judge, Hon. J. A. McCullough, erred in charging the jury, on the request of plaintiff, as follows: ‘That if the jury find that the plaintiff was injured by an accident resulting from the concurrent negligence of a fellow-servant and of the defendant, the defendant is liable as though it were the sole offender.’ The error being: (a) The charge leaves entirely out of account the question of proximate cause, and instructs the jury, in effect, that plaintiff can recover for an accident resulting from any previous negligent act of the defendant, remote or proximate, if it concurred with a negligent act of a fellow-servant. (b) The instruction was more erroneous and hurtful to the defendant because the presiding judge elsewhere in his charge instructed the jury that an accident and a negligent act are entirely different, and to be distinguished one from the other. (c) The effect of the charge was to instruct the jury that the defendant would be liable for an accident. (d) It decides all questions against the defendant, and practically instructs the jury to render a

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verdict in favor of plaintiff, inasmuch as one of the defenses of the railway company was that the cause of the injury was the accidental falling of a fellow-servant.

“(7) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the defendant’s third request, as presented, as follows: ‘The jury cannot find for the plaintiff unless the preponderance of the evidence shows that the defendants were guilty of negligence as charged in the complaint, and that such negligence was the proximate cause of the injury; and, in order to warrant a finding that the negligence complained of was the proximate cause of the injury alleged, it must appear that the injury was a natural and probable consequence of the alleged negligence, and that it could have been and ought to have been foreseen’—and in modifying the same by striking out the words, ‘and that it could have been and ought to have been foreseen.’ The error being: (a) The charge, as modified, makes the defendant liable, whether the alleged injury, as the result of the alleged negligence, could have and ought to have been foreseen, or not. (b) The request, as presented, contained a sound proposition of law, and ought to have been charged without modification.

“(8) The presiding judge Hon. J. A. McCullough, erred in refusing the defendant’s fourth request, as follows: ‘If the jury believe that the cause of the injury was the accidental falling of one of the plaintiff’s co-workers, and that this fall was not caused by the negligence of the railway company, then the plaintiff cannot recover. The error being: (a) The request contained a sound proposition of law, and should have been charged as submitted. (b) The modification emasculates the request. (c) The modification makes the defendant liable for consequences of the fall, although not liable for the fall itself, and allows recovery for negligence not alleged in the complaint.

“(9) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the jury, as requested by the defendant, as follows: ‘If the jury believe that the force of hands furnished to the plaintiff was sufficient and safe for doing the work in hand in a different way from that which he adopted, then the plaintiff cannot recover, if the evidence shows that his injury resulted from his use of the force for the work in a more dangerous way, unless the evidence also shows that he was directed or required by his employer to adopt such more hazardous way’—and in modifying the same by inserting therein the word ‘negligent.’ The error being: (a) The request contained a sound proposition of law, and it was error not to charge it as presented. (b) The defendant was entitled to the instruction that the use of a more hazardous way for doing work, when the plaintiff knew of a safe way, was in itself negligence that would bar a recovery. (c) In instructing the jury that, before plaintiff could be barred for contributory negligence, defendant must show more negligence on

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the part of plaintiff than the adoption of a method for doing the work known to be dangerous.

“(10) The presiding judge erred in refusing to charge the defendant’s seventh request, as follows: ‘If the negligence against which the plaintiff complains—if there was any such negligence on the part of the railway company—was long enough before the injury to admit of plaintiff’s guarding against it by the use of ordinary care, and he failed to do this, knowing of such negligence of the railway company, there can be no recovery.’ The error being: (a) The request contained a sound proposition of law, and it should have been charged as presented. (b) In view of the fact that the negligence complained of occurred long prior to plaintiff’s injury, the request contained a sound proposition of law applicable to the case as made, with reference to the question of contributory negligence, and its refusal eliminated that defense in the most material aspect of the defendant’s case.

“(11) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the defendant’s eighth request, as follows: ‘The courts will not take better care of a man than he takes of himself; hence, if an employee knows that the work in which he is engaged is dangerous, or that the appliances used by him are dangerous or insufficient, and fails to exercise ordinary care and observation to protect himself after such knowledge, he cannot recover; and, if the jury find such conditions to exist here, their verdict should be for the defendant.’ The error being: (a) The request contained a sound proposition of law, and should have been charged as presented. (b) In view of the fact that the negligence complained of occurred long prior to the plaintiff’s injury, the request contained a sound proposition of law, applicable to the case as made, with reference to the question of contributory negligence, and its refusal eliminated that defense in the most material aspect of the defendant’s case. (c) It is the duty of an employee to exercise ordinary care, even when the master has given him defective appliances with which to work, and the refusal of the circuit judge to present this charge to the jury ignored this principle, and relieved the plaintiff from the exercise of such ordinary care, if the master had previously been negligent in failing to furnish a sufficient force.

“(12) The presiding judge, Hon. J. A. McCullough, erred in refusing to grant a new trial, because the testimony, taken in its strongest light in favor of the plaintiff, shows that the proximate cause of the injury was not the negligence of the defendant, but the accidental falling of one of the plaintiff’s fellow servants, and it was error of law to refuse a new trial on this ground.”

Sheppards & Grier and S. J. Simpson, for appellant.
Graydon & Giles and Caldwell & Park, for appellee.

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Statement of Facts.

GARY, A. J. The allegations of the complaint, material to the consideration of the questions raised by the exceptions, are as follows:

“(2) That at the time hereinafter mentioned, and for a long time prior thereto, the plaintiff was employed by the said defendant as section foreman upon section 18 of defendant's said line of railroad, and, as such foreman, was ordered and required, in addition to the other duties imposed upon him, to haul and put in piles upon the side of said railroad, certain steel rails, which had been taken up from said track and cast alongside the same.

“(3) That during the summer of 1899 the said defendant furnished to the plaintiff a force of six section hands to do the ordinary and usual work required on said section, but, prior to giving the special orders to haul and pile the said steel rails, the said defendant had reduced plaintiff's force of hands to three, and had required plaintiff to take the place of a hand, and assist in all such work as required the services of more than three men.

“(4) That when the plaintiff was ordered and required by the defendant to haul and pile and said steel rails, he requested the said defendant to send him more help, protesting that the said steel rails were entirely too heavy (each one of them weighing 600 pounds or more) for the three hands and himself to handle, whereupon the said defendant promised two more men to assist in the said work, in the meantime requiring plaintiff to do and perform the same.

“(5) That it was the defendant's duty to furnish to the plaintiff proper appliances and the help necessary to do and perform the work assigned to him and required of him, and, notwithstanding its said promise, it willfully and negligently and carelessly disregarded its duty to plaintiff, and his request for more help, and failed to furnish to the plaintiff a sufficient force of hands to do the work required of him, and that such negligence of the defendant was the direct cause of the injury to the plaintiff hereinafter set forth and alleged.

“(6) That on the 15th day of February, 1900, while the plaintiff, in compliance with the orders of the defendant, was trying, with the assistance of his three hands, to carry one of the said steel rails up an embankment for the purpose of loading it on his car and hauling and piling it as aforesaid, one of his said hands was entirely overcome and exhausted by the great weight of the said steel rail, on account of the failure of the defendant to furnish a sufficient force to carry the same, and fell to the ground, thereby causing the whole weight of one end of the steel rail to be thrown on the plaintiff, by which his right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs.”

Upon the first trial the jury rendered a verdict in favor of

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the plaintiff for \$2,400, but on appeal the Supreme Court granted a new trial. 61 S. C. 468, 39 S. E. 715. When the case was tried the second time, the jury found a verdict in favor of the plaintiff for \$1,000, which was set aside by the presiding judge on the ground that, if the plaintiff was entitled to recover any sum at all, the said amount was inadequate. On the third trial the verdict was in favor of the plaintiff for \$3,000. The defendant appealed upon exceptions, which will be reported.

Opinion.

First Exception. This exception raises the question whether his honor the circuit judge had the power to grant a new trial for inadequacy in the amount of the verdict. Section 2734 of the Code of Laws provides that "circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law in this state." Section 286 of the Code of Procedure, in subdivision 4, contains the provision that "the judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions *or for insufficient evidence*, or for excessive damages, but such motions, if heard upon the minutes, can only be heard upon the same term at which the trial is had." (Italics ours.) While 14 Enc. of Pl. & Pr. 764, does contain the language quoted in the opinion of Mr. Chief Justice Pope, under the head of "Inadequate Damages for Torts—Common-Law Rule," it also adds immediately thereafter these words: "But the modern rule is that a new trial may be granted, in actions for torts, where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive." And under the head of "Code Provisions," on page 766, it also says: "The Code provisions as to new trials for inadequate damages appear, in general, to be merely declaratory of the common law. In some states the Codes have been amended so as to permit new trials where the verdict is so inadequate as to indicate passion or prejudice. In the absence of such amendment, a new trial may be granted for inadequate damages, on the theory that *the verdict is contrary to the evidence*." (Italics ours.) In 16 Ency. of Law (1st Ed.) 591, it is said: "Where a verdict gives grossly inadequate damages to a plaintiff, it is as much a ground for a new trial upon the motion of the plaintiff as a verdict for excessive damages would be upon the motion of the defendant." In a note on the same page, the following language is quoted from McDonald v. Walter, 40 N. Y. 551: "A verdict for grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to

make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged." The case of *Benton v. Collins* (N. C.) 34 S. E. 242, 47 L. R. A. 33, is well considered, and fully sustains our views upon this question. The cases from our Reports, cited in the opinion of Chief Justice Pope, while showing that the courts should cautiously exercise the right to grant new trials for inadequacy in the amount of the verdict, nevertheless clearly lay down the principle that the court has the power to grant a new trial in such cases. See, also, *Stuckey v. R. R.*, 57 S. C. 395, 35 S. E. 550, and cases therein cited, which even show that the circuit judge may, in his discretion, impose conditions upon granting a new trial.

Second Exception. Assignments of error "a," "b," "c," and "d" will be first considered. The only ground of objection interposed by the defendant to the introduction of the testimony on the trial of the case in the circuit court was that it was incompetent. This objection failed to specify in what particular the testimony was inadmissible, and is therefore too general to be considered. But waiving this objection, and considering the grounds set forth in the exceptions, they cannot be sustained, as the testimony was explanatory of the method for operating the appliances.

Assignment of error "e." In the first place, the witness testified that a larger force of hands would not have been safer in this case; and, in the second place, the testimony was responsive to the issues made by the pleadings.

Third Exception. The jury informed his honor the presiding judge that they had decided that it would be of no benefit to them to visit the place where the accident occurred. It was wholly within the discretion of the presiding judge whether he would send the jury to view the place where the injury occurred, and, under the circumstances, his discretion was properly exercised.

Fourth Exception. When the presiding judge spoke of "this extra work," he did not mean to decide the question of fact, but only to refer to the extra work mentioned in the pleadings, which he had just explained to the jury, and which he pointed out as an issue in the case.

Fifth Exception. The charge embodied a sound proposition of law, and, if the defendant desired further explanation of the principle therein stated, it should have prepared requests to that effect.

Sixth Exception. The charge mentioned in this exception is to be considered in connection with other portions of the charge. By reference to the charge set out in the seventh exception, it will be seen that the appellant had the benefit of the principle as the proximate cause of the injury.

Seventh Exception. The charge, as modified, conformed to

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the principle stated in *Harrison v. Berkeley*, 1 Strob. 525, 47 Am. Dec. 578, cited with approval in *Pickens v. R. R.*, 54 S. C. 503, 32 S. E. 567, in which the court says: "It is required that the consequences to be answered for should be natural as well as proximate. By this I understand, not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjunction of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from."

Eighth Exception. The presiding judge said: "I refuse to charge you that, that way. I charge you that request as follows: 'If the jury believe that the cause was the accidental falling of one of plaintiff's co-workers, and that this fall, I have added, or its consequences, was not due to the negligence of the railway company, then the plaintiff cannot recover.'" The authority last cited sustains the charge as modified.

Ninth Exception. His honor said: "I cannot charge you that way, but I charge you that with this modification, and you will pay attention now to the charge as I now read it to you: 'If the jury believe that the force of hands furnished the plaintiff was sufficient and safe for doing the work in hand in a different way from that which he adopted, then the plaintiff cannot recover, if the evidence shows that his injury resulted from his negligence, from his negligent use of the force for the work in a more dangerous way, unless the evidence also shows that he was directed or required by his employer to adopt such more hazardous way.' That is for you. Take into consideration the facts as they presented themselves to plaintiff on that occasion. Was he negligent? Did he lack ordinary care in the way in which he handled those rails? Gentlemen of the jury, in handling them, did he fall short of that standard—the standard of ordinary care? If you find that he did, and that caused the injury, then—why, then, of course, under the charge which I have given you, he contributed to his own injury. If you find on that occasion that he didn't fall short of the standard, taking everything into consideration—he handled the rails with the force of hands just as an ordinarily prudent man would have been expected under the same circumstances—he would not be guilty of a lack of ordinary care. Then, if defendant was negligent, you cannot charge him with contributory negligence." The request to charge was objectionable, for the reason that it undertook to say what facts would constitute negligence. Even if the evidence showed that the plaintiff's injury resulted from his use of the force for the work in a more dangerous way, and also that he was not directed or required by his employer to adopt the more hazardous way, nevertheless it

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was for the jury to draw the inference therefrom, and to determine whether such facts constituted negligence.

Tenth Exception. The case of *Youngblood v. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, shows that the request to charge was properly refused, in which the court uses this language: "Section 15, art. 9 of the Constitution, sets at rest any doubts that might be entertained on this question. It provides that 'knowledge by an employee injured by the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to the conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them.' In other words, where an employee is injured while voluntarily operating machinery after knowledge of its unsafe condition, his action for injury caused thereby shall not be defeated by reason of this fact. The word 'defense' is not used in its technical sense. The words 'shall be no defense to an action' are to be understood as meaning 'shall not defeat an action.' The Constitution did not intend to deal with pleadings, but with a principle of law. It did not intend that a defendant on a motion for nonsuit should get the benefit of a state of facts which the Constitution declared should be no defense to the action." The object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employee by showing that he did not act with due care in voluntarily operating the machinery after knowledge of its defective condition.

Eleventh Exception. This exception is likewise disposed of by the case last mentioned.

Twelfth Exception. There was testimony to sustain the finding of the jury. This exception must therefore be overruled.

The judgment of the circuit court is affirmed.

JONES, J., concurs.

POPE, C. J. (dissenting). This is the second visit of this action to this court. The jury at the first trial gave the plaintiff \$2,400 damages. A new trial was ordered by this court. See 61 S. C. 468, 39 S. E. 715. At the time of new trial, before Judge Ernest Gary and a jury, a verdict for \$1,000 was given the plaintiff, but, on the ground of inadequacy of verdict, the circuit judge ordered a new trial. At the third trial, before the Honorable Joseph A. McCullough, as special judge, and a jury, a verdict for \$3,000 was given the plaintiff. After entry of judgment on this last verdict, the defendant gave notice of its appeal from the order of Judge Ernest Gary granting a new trial, and also its appeal from the judgment for \$3,000. Exceptions were exhibited against the order of Judge Ernest Gary and the judgment for \$3,000. It is apparent that if the order of Judge Ernest Gary is untenable, because erroneous, there is no ne-

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cessity to consider any of the grounds of appeal in the last case, for, if Judge Ernest Gary was in error, the verdict for \$1,000 still remains a valid verdict, and the judgment for \$3,000 must be set aside as a nullity. We will therefore first consider the exceptions presented to Judge Gary's order for a new trial.

It will be proper to state what the character of the action is, as stated by the pleadings and the judgment of this court in this action, as found in 61 S. C. 468, 39 S. E. 715. Mr. Justice Jones, in passing upon the issues as presented by the pleadings, said:

"This appeal comes from a verdict and judgment in favor of plaintiff in an action for damages for personal injuries alleged to have been sustained through defendant's negligence in failing to furnish an adequate force of laborers to do the work required of the plaintiff as section track foreman, in the hauling and piling of steel rails, after application for additional help by the plaintiff, and promises of defendant to supply the same. The sixth paragraph of the complaint alleged:

"(6) That on the 15th day of February, 1900, while the plaintiff, in compliance with the orders of the defendant, was trying, with the assistance of his three hands, to carry one of the said steel rails up an embankment for the purpose of loading it on his car, and hauling and piling it, as aforesaid, one of the said hands was entirely overcome and exhausted by the great weight of the said steel rail, on account of the failure of the defendant to furnish a sufficient force to carry the same, and fell to the ground, thereby causing the whole weight of one end of the steel rail to be thrown on the plaintiff, by which his right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs.'

"Besides the general denial, the defendant interposed, as special defenses, contributory negligence and assumption of risk after knowledge."

As before stated, at the trial before Judge Ernest Gary and a jury, a verdict for \$1,000 was given to the plaintiff. Just then the "case" for appeal is as follows: "The plaintiff's counsel moved on the minutes of the court for a new trial on the ground of inadequacy in the amount of the verdict. Against the objection of defendant's counsel, this motion was granted, and a new trial ordered; the presiding judge signing the following order: 'The jury charged with the above stated case having rendered a verdict in favor of the plaintiff for \$1,000, and it appearing to the court that, if he was entitled to recover any sum at all, the said amount is inadequate, on motion of Caldwell & Park and Graydon & Giles, plaintiff's attorneys, it is ordered that the said verdict be set aside and a new trial granted.' " No notice of appeal was given and no exceptions were taken immediately after this order for a

new trial, and no notice of appeal nor exceptions taken to said order until after the judgment on the verdict for \$3,000 was entered.

The grounds of appeal as to the order for a new trial were as follows: “(1) The defendant excepts to and appeals from the order or judgment of Judge Gary setting aside the verdict rendered on the trial before him, and granting a new trial, on the ground that the circuit judge did not have the power to grant such new trial for inadequacy of the amount of the verdict rendered, and it was error of law for him to do so.” In considering the error alleged, we will first examine the question as to the right of the appellant to maintain his appeal, under the law of this state governing appeals; then we will examine the right of the circuit judge, under the rules of the common law, to grant a new trial for inadequate damages awarded by the jury; and, lastly, what the rule is as fixed by our decisions and statutes on this subject.

1. Has the defendant the right of appeal from Judge Gary's order for a new trial because the damages awarded were inadequate? We have before stated that all that the defendant did at the time that the order for new trial was made by Judge Gary was to object to the passage of such order. It must be manifest that, when this order was made, the whole proceeding of the second trial became as if nothing had been done, so far as the trial was concerned; that the action stood for trial just as it did when the court awarded a new trial, as laid down in 61 S. C. 468, 39 S. E. 715. There having been a verdict for the sum of \$1,000 for the plaintiff before Judge Gary, this verdict was wiped out, at the instance of plaintiff. Was this not a material matter to the defendant? Now, there can be no doubt that it was in the power of the defendant to have appealed from that order forthwith after its passage. Section 11 of the Code of Civil Procedure of this state, “D,” under subdivisions 1 and 2, amply provide for an appeal from an order of this character, for in (1) it is provided, “Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas, * * *” and in (2) “an order affecting a substantial right made in an action, when such order determines the action and prevents a judgment from which an appeal might be taken * * * and when such order grants or refuses a new trial. * * *” Thus it is shown that an appeal could have been taken as soon as the order was made. Could the defendant safely await the rendition of a final judgment before Special Judge McCullough, at which time he gave notice of appeal from Judge Gary's order, and exhibited his ground of appeal therefrom? Under section 11 of the Code of Civil Procedure of South Carolina, at page 7, under subdivision 1, it is provided: “Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas * * * brought

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there by original process * * * provided, if no appeal be taken until final judgment is entered, the court may, upon appeal from such final judgment, review any intermediate order or decree necessarily affecting the judgment not before appealed from." In construing this provision, this court has held that, where no notice of appeal was given and no exceptions taken at the time the intermediate order was made an appeal from such intermediate order may be taken along with the final judgment appealed from. *Hyatt v. McBurney*, 17 S. C. 150; *Lee v. Fowler*, 19 S. C. 607; *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430; *Morgan v. Smith*, 59 S. C. 49, 37 S. E. 43, and many other cases cited on page 8 of the Code of Procedure. We hold, therefore, that the order was appealable, and that the appeal could be heard by this court on the hearing of the final appeal in this case.

2. Could the circuit judge (Judge Ernest Gary) base his order upon the rules of the common law relating to orders for new trials because of inadequacy of verdict? In the fourteenth volume of *Encyclopædia of Pleading & Practice*, 764, the following statement is made: "Inadequate Damages for Torts—Common-Law Rule. At common law, new trials were not granted on the ground that the damages awarded for torts were inadequate or insufficient; at least, such was the rule as to damages for trespass and slander, which were regarded as analogous to prosecutions for crime. It was also said that, where there was no legal measure of damages, the verdict should be conclusive. The rule was to some extent influenced by a rule of court that a new trial would not be granted where the verdict was small in proportion to the costs required for a new trial." Again, in the same work, at page 765, under the heading, "New Trials for Inadequate Damages not Granted at Common Law," is the following: "There has never been a doubt that the power to grant new trials for excessive damages exists at common law, as well in actions ex delicto as in actions ex contractu; but smallness of damages seems not to have been ground for a new trial, at least in actions of trespass, until it was made such by statute apparently for no better reason than that actions for torts (at least, actions of trespass vi et armis), were considered as bearing an analogy to prosecutions for crimes, as to which it is an admitted doctrine that whilst a new trial may be granted, upon the application of the accused, upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth because the penalty assessed by the jury is too small." We might cite many other authorities, but upon reflection it seems the foregoing citations are sufficient to establish the proposition that, under the common law, the trial judge had no right to pass the order.

3. What is the rule as to granting new trials in cases of personal injuries, when the plaintiff conceives his verdict to be

inadequate, established in this state both by our decisions and our statutes? We remark that in the year 1789 (see 7 St. at Large, p. 253) our General Assembly enacted as follows: "That from and after the sitting of the several circuit courts next ensuing, the said circuit court shall [have] and they are hereby declared to possess and shall be capable of exercising the same complete and original and final jurisdiction as possessed and exercised by the courts of general sessions of the peace and of common pleas now held in Charleston unless otherwise directed by this act according to the custom, usages and practice of the said courts; any law, custom or usage to the contrary notwithstanding." The common law of England was made of force in this state to govern the courts as they existed in this state prior to 1789, but a more generous holding of the courts in this state was provided by this statute in the year 1789, and the object of this statute was to clothe these new courts of common pleas with all the power formerly exercised by the courts that were confined to the city of Charleston. This statute remained of force until the year 1872, when it was formally repealed. But in the year 1868, in September, an act was passed by the General Assembly of this state by which it was enacted, in section 1, that circuit judges "shall have the power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of the United States." See 14 St. at Large, p. 136. This provision was adhered to in the General or Revised Statutes adopted in 1872. However, the General Statutes of 1882 changed this by striking out the words "of the United States," and inserting the words "of the courts of law of this state." See section 2113 of General Statutes of 1822. And so the law stands still to-day. See section 2734 of the Code of 1902. Thus it is made necessary for us to see, by examination of our decisions, what were the reasons given for granting new trials, as they have been usually granted. We find but two decisions when new trials were granted because of inadequacy of verdicts in cases of personal injuries. These are *Bacot v. Keith*, 2 Bay, 466; *Wallace v. Frazier*, 2 Nott & McC. 516. In the former, where there was a ferocious assault and battery, the jury only accorded the plaintiff \$1 of damages. The Court of Appeals declared: "The judges were unanimously of the opinion that the jury in this case had behaved most shamefully, and deserved the severest reprehension of the court for such glaring partiality and injustice. And although it was not usual to grant new trials on account of the smallness of damages, yet this was so extraordinary a case, in which every principle of justice has been outraged, that they could not hesitate a moment in ordering a new trial, and that without costs." In the latter case, it was a suit to recover damages for the breach of a warranty in writing for the soundness of a negro which was really unsound,

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This was, therefore, *ex contractu*. The jury found for plaintiff one cent damages. The court ordered a new trial, and said: "The testimony on the point was clear and uncontradicted, and the jury was not authorized to disregard it, and adopt an arbitrary rule of their own, unsupported by any testimony. The verdict was clearly against the evidence, and a new trial must be awarded." Now, we come to examine cases in our Reports on the subject granting new trials for verdicts for excessive damages. Many cases will be found sustaining that right. *Bourke v. Bulow*, 1 Bay, 49; *Nettles v. Harrison*, 2 McCord, 230; *Richardson v. Murray*, Cheves, 11; *Morgan v. Livingston*, 2 Rich. Law, 582; *Mayson v. Sheppard*, 12 Rich. Law, 254; *Poppenheim v. Wilkes*, 2 Rich. Law, 354; *Fripp v. Martin*, 1 Speer, 236; *Davis v. Ruff*, Cheves, 17, 34 Am. Dec. 584; *Stott v. Ryan*, 3 Brev. 417. It was well said: "That courts have no right to annul the verdict of a jury solely on account of the smallness or insignificance of the sum allowed is well settled. They have the authority only where gross injustice clearly appears aliunde the verdict. It is a power the courts are loath to exercise, for in no case is there greater danger of usurping the exclusive function of the jury. In actions of the nature of the one at bar, there is no measure of sums." "No custom or market or law fixes a value to the injury done, and therefore the law has made it the exclusive and peculiar province of the jury to name the amount to which a plaintiff may be entitled. No other judgment or opinion must be substituted for the combined judgment and opinion of the jury."

But what is our statute law on this subject? Very clearly, provision is made for the grant of a new trial for excessive damages by the circuit judge, but no mention is made therein of the power of a circuit judge to grant a new trial for inadequacy of the verdict in cases of personal injury. Our Code of Civil Procedure, under section 286, in the fourth subdivision, provides, "The judge who tries the cause may in his discretion entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, if heard upon the minutes, can only be heard at the same time at which the trial is had." This has been the statute law of this state for years. We thus see that the motion granted by the circuit judge in the case at bar was not sanctioned by the common law, nor was it sustained under the statutes of this state, as is shown by the decisions of our court. It was not a usual course in our courts to grant motions for a new trial upon the inadequacy of verdicts of juries. An examination of our Reports will fail to disclose an instance where a verdict of \$1,000 in a suit for \$10,000 has ever been held as an inadequate verdict. The very fact that every Code of this state has provided the power in circuit judges to grant new trials for excessive damages, and in no

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instance has provided for power in circuit judges to grant new trials for inadequate damages, is a strong circumstance. To admit the existence of this power in the circuit judges, without a line of authority therefor, is fraught with great danger.

This conclusion renders it unnecessary to consider any other questions presented by this appeal. In my opinion, it follows that we must reverse and set aside all the proceedings before Special Judge Joseph A. McCullough, and order the action remanded to the circuit court, with directions to that court to carry out our judgment, reversing the order for a new trial granted by Judge Ernest Gary, with leave to the plaintiff to enter up his judgment on the verdict for \$1,000 rendered by the jury in the trial of this action had before the Honorable Ernest Gary as circuit judge.

On Rehearing.

(May 18, 1903.)

PER CURIAM. After careful examination of the petition for a rehearing in this case, and the court being satisfied that no material question of law or of fact has either been overlooked or disregarded, it is ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

PENNSYLVANIA R. CO. v. JONES.

(Circuit Court of Appeals, Third Circuit, July 7, 1903.)

[123 Fed. Rep. 753.]

Master and Servant—Safe Place to Work—Question for Jury.*

In an action against a railroad company to recover for the death of a brakeman who was killed by the backing of the rear car of a train, on which he was stationed, over the end of a switch which terminated on a trestle, in the nighttime, it was not error to submit to the jury the question whether defendant, in leaving the end of the switch unprotected by a bumper, failed to perform a primary duty, which it owed to its employees, to exercise ordinary care to provide them with a reasonably safe place to work, where the effect of an affirmative finding was properly limited with respect to the assumption of the risk by decedent.

Same—Assumption of Risk—Knowledge of Extraordinary Danger.

The failure of a railroad company to place a bumper or other obstruction at the open end of a switch which terminated on a trestle some feet above the ground subjects train employees to a danger which is not one of the ordinary risks of the employment, and which an employee cannot be said as matter of law to have assumed; and a defense set up by the railroad company to an action for the death of an employee, caused by the backing of a car off the end of the switch in the nighttime, that the danger was so obvious that the deceased, who was shown to have been an experienced man, and to have been in the place some six or seven times, must or should have knowledge of it, and assumed the risk, or was guilty of contributory negligence, raises an issue of fact for the jury, unless the evidence of actual knowledge is clear, and the burden of proof upon such issue rests on the defendant.

Same—Contributory Negligence of Fellow Servant.*

Where a brakeman was killed by the backing of a car in the night

*See preceding case and foot-note.

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from the end of a switch track which was left unprotected through the negligence of the railroad company, the fact that the negligence of fellow servants in handling the train also contributed to the accident does not relieve the railroad company from liability.

Archbald, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John Hampton Barnes, for plaintiff in error.

S. Morris Jones, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and ARCHBALD, District Judge.

GRAY, Circuit Judge. This was a suit brought by the defendant in error, administratrix of the estate of Philip W. Jones, deceased, against the Pennsylvania Railroad Company, the plaintiff in error. The cause of action was the alleged negligence of the defendant below, in not providing, at a certain point on its road, a sufficiently long side track or switch to accommodate a long train, without danger of running off the end thereof, and in not having provided at the said end of said side track a sufficient bumper or obstruction, by which a train backed thereon might be checked from running off. There is no dispute about the physical situation, as disclosed by the evidence.

The decedent, Philip W. Jones, was a freight brakeman employed on the Amboy Division of the Pennsylvania Railroad Company, the defendant below. On the 1st of December, 1900, he was one of the crew of an extra freight train, consisting of 26 cars, 5 of which were gravel cars loaded with gravel. It was necessary to leave certain cars at Palmyra, and to do so, it became necessary to back the train on to the siding in question, which at its further end ran into a private coal yard, and up on to a trestle about 5½ feet high, used for dumping coal. The whole siding, including that part of it on trestles in the private coal yard, was built by the railroad company, and the latter was occasionally used by it for its own purposes in shunting cars, and as an extension of their siding, when very long trains were necessary to be handled. On the evening of the night of the accident, the proprietors of the coal yard, who closed their place of business at 6 o'clock, were asked by representatives of the defendant company to leave open the large gate which closed down upon the siding, and thus shut off the part inside the coal yard, which was about the length of three cars, in order that it might be used, as it was used, for the shunting of an expected long train of freight cars. Late in the night in question, the extra freight, to which reference has been made, arrived, and the conductor thereof ordered it to be backed on to this siding. The orders were given to the engineer and the two brakemen, and the decedent, as rear brakeman, was standing on the rear end of the rear car, which was a gravel car loaded with gravel.

thus facing the direction in which the train was moving. The whole siding, including the trestle work, was shorter than the train being moved on to it. The night was dark, and the train was pushed so far that the rear car went over the trestle, causing the almost instant death of decedent. If does not appear from the evidence that, at the time of the accident, there was anything placed on the tracks near the end of this trestle to obstruct or check a car or train moving thereon. It was in evidence, however, that at times a piece of scantling, 4"x5" or 5"x6", was placed loose across the tracks near the end of the trestle, without being bolted or otherwise secured thereto. The decedent had had more than a year's experience as a freight brakeman, and had been a member of this crew for two or three months. The conductor testified that the crews alternated every week, there being sometimes two and sometimes three shifts, so that each crew would go over this part of the road every second or every third week. This brought the decedent four or six times on this siding, sometimes at night and sometimes in the daytime. This was the only evidence from which an inference of knowledge of the situation or appreciation of the danger on the part of the plaintiff below could have been drawn. No testimony was offered by the defendant, but on the testimony as presented by the plaintiff, the court was asked to give binding instructions for the defendant. This the court refused to do, and submitted the case to the jury, with a charge as to the law, to which no specific exception was taken. The verdict having been rendered in favor of the plaintiff, a motion was submitted for a judgment for defendant, non obstante veredicto, which motion was denied, and judgment for plaintiff was entered upon the verdict. The assignments of error are two;

(1) That the learned judge erred in declining to affirm the defendant's sixth point of charge, which was as follows: "Under all the evidence in the case, the verdict of the jury must be for the defendant."

(2) The learned judge of the Circuit Court erred in denying defendant's motion to enter judgment for it, non obstante veredicto.

The two questions submitted by the court to the jury were:

First. Whether decedent's death was due to negligence on the part of defendant;

Second. Whether, if it were, it was negligence committed in violation of a duty which the railroad company owed to decedent, in view of the fact that he was an experienced railroad man and had been in this place several times.

These two propositions were elaborated and explained at length to the jury, and no exception is taken to the correctness of the views expressed thereon by the learned trial judge; the contentions here being, that a binding instruction in favor of the defendant should have been given to the jury, and

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the equivalent one, that a motion for judgment, notwithstanding the verdict, should have been allowed. We think that the two questions above stated were properly submitted to the jury by the trial judge. Clearly defendant below cannot complain that the trial judge should have left to the jury, with proper limitations as to assumption of risk by decedent, the general question, whether defendant had or had not performed the primary duty incumbent upon it, of exercising the care which an ordinarily prudent and careful man would have taken, to make reasonably safe the place in which its employees were to work. In other words, whether it was negligence on the part of defendant to leave the end of a siding, running up upon such a trestle as is described in the evidence, without a bumper or other obstruction at its further end, sufficient to check or prevent the running off thereof of a rear end of a train or car backed thereon. It is true that the application of the rule in regard to the duty of an employer to provide a reasonably safe place in which his employees must work, is to be considered in connection with other rules of law which, according to the facts and circumstances of particular cases, may enter into the determination of liability of the employer, but whether such a reasonably safe place as the law requires has been provided, apart from the qualifying considerations referred to, is logically the first matter to be determined by the jury. In view of the situation disclosed by the evidence in the case before us, we have no hesitation in saying that a jury would be justified in finding that this general and primary duty of the defendant had not been performed, and that, therefore, the danger resulting from leaving unprotected, by bumper or other obstruction, the end of the tracks raised 5½ feet from the ground, on a trestle, was not one of the usual and ordinary risks of the service or employment upon which decedent had entered. The plaintiff in error, however, assuming for the sake of the argument, that this is so, contends that the allowing of the situation to be as it was, was not specific negligence as to the decedent; that is, that it was not the violation of a duty which defendant owed to the decedent, in view of the fact that he was an experienced railroad man, and had been in this place several times during the two or three months preceding the accident. The learned judge of the court below considered the question in this form, but submitted to the jury the question, whether, from all the evidence, there was ground to infer that the decedent was so fully informed as to the situation, or, from the circumstances of the case, ought to have been so informed, as that his remaining on the train would be an assumption of the hazard of the situation. In thus submitting the question to the jury, we think he was fully justified.

There is no direct evidence as to decedent's knowledge of the situation. All the testimony relating to it, is that of the con-

ductor and two witnesses, one of whom owned, and the other worked in, the coal yard where the trestle was situated. The facts established by this testimony are, that decedent had been employed in this particular service from two to three months, and as the crew to which he belonged alternated with other crews twice or three times a month, he had been in on this siding from four to six times, sometimes during the day and sometimes at night. That across the end of the trestle, there was sometimes a piece of loose scantling, 4"x5" or 5"x6", and that sometimes there was none at all, and on the night in question, there is no testimony that there was anything placed upon the track for the purpose of checking the train. These are the facts, and the only facts, from which an inference was to be drawn, that the decedent was acquainted with the situation and the danger thereof, and that in taking his position on the rear of that train on the night of the accident, he voluntarily encountered the danger and assumed the risk thereof. The facts are meager, but are not disputed, and the inference of such a knowledge on the part of the decedent, as will relieve the defendant below of all liability for what happened, does not so certainly arise from them as to permit a court to say that no other could reasonably be drawn by a jury.

It is true that, in undertaking the work of his employment, the employee assumes all the usual and ordinary risks incident thereto; but, as this court, in *Bethlehem Iron Co. v. Weiss*, 100 Fed. 45, 40 C. C. A. 274, has said:—

“It is the duty of the master, whether that duty rests upon the terms of the contract of service, express or implied, or upon the rules of law governing the situation, to see to it that the servant is exposed to no extraordinary risks which he could not reasonably anticipate. In other words, that there are no risks attending the business other than such as usually attend business of that general nature, or, if there are such extraordinary risks, that they should be explained to the servant, or be known by or be entirely obvious to him.”

In the case before us, there was some evidence tending to show that it was usual on well regulated railroads to place bumpers or obstructions at the end of side tracks or switches, especially upon those whose ends were raised some distance from the ground, and as we have already said, the jury were justified in finding, that there was general negligence in permitting the end of the trestle to be without a bumper or obstruction sufficiently secured to prevent the running off of a car or train. The defense, that the unusual and extraordinary danger arising from this situation was so obvious and well understood by the decedent, as that he should have been held to have assumed the risk thereof, and thereby relieve the defendant of the liability he would otherwise have incurred to plaintiff, is an affirmative defense, and must be proved to the satisfaction of the jury. What constitute the

usual and ordinary risks of employment, which an employee must be taken to have assumed upon entering the service of his employer, are ordinarily for the determination of the court, and this determination is made without regard to the actual knowledge of the employee in this regard. Unusual and extraordinary risks, however, which are not incident to the service, can only be said to have been assumed by the employee, when it is shown that he has full knowledge of their existence, or ought reasonably, in the exercise of ordinary prudence and intelligence, to have had such knowledge. The evidence of such knowledge may be so undisputed and clear, that reasonable men cannot differ as to the fact, and in such case, the court will instruct the jury to find for the defendant; but it must often happen, that the evidence on this point is not so clear and certain as to warrant the court in taking this course, and there would be grave error in taking such a case from the jury. In the absence of such knowledge, actual or imputed, the decedent had a right to rely upon the defendant below having properly constructed and safeguarded the siding and trestle in question, and if defendant were derelict in this respect, it failed in a duty owing to the decedent, and was guilty of judicial negligence to that extent. The facts established by the testimony do not seem to us to be such as that no other inference could be drawn therefrom, than that the danger resulting from this default on the part of defendant was so obvious that decedent must be assumed, as a matter of law, to have had full knowledge thereof, and therefore to have assumed the risk arising therefrom. He had been in upon this siding from four to six times in the course of two or three months. Of course, the jury would be justified in assuming not more than four times, and those occasions were, some of them, during the night and some during the day. It does not appear what the length of the trains were that were backed in upon these occasions, nor how near the end of the trestle the rear car approached, nor whether there was, or was not, always the piece of scantling across the track, or whether or not it had served to check or stop the movement of the cars or train at any time, nor does it appear whether this piece of scantling was actually upon the track at the time the unusually heavy train, on the night of the accident, was pushed back. There is nothing in the record to show that, at any other time, any car or train failed to be stopped in time to avoid an accident, or was ever pushed over the end of the trestle. It is not an unfair assumption, therefore, that the natural impression made upon the decedent, from his experience in this respect, was, that cars could be backed up upon the trestle with safety, and that when, in obedience to his superior, he took his station upon the rear car that night, there was nothing so obviously dangerous in the situation as to threaten immediate injury, or to indicate that he could not

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safely perform the duty of his station, if the train were backed with the care and caution exercised on former occasions. The danger resulting from the neglect of the defendant below to provide a reasonably safe place in which the decedent could work (whether obvious or not) had been avoided on the previous occasions on which the defendant might have been exposed thereto, presumably, by the care and caution exercised by the engineer in backing the train on to the trestle. On the night of the accident, however, we cannot say that the jury would be unwarranted in finding no reason why decedent should conjecture a different state of things. If the train was backed off the trestle, through negligence of the engineer (a fact not unreasonable for the jury to find), it was this negligence that exposed decedent to the "unusual and extraordinary" peril of the situation, and not the fault of decedent himself, and although the neglect was that of a co-employee contributing to the accident, the employer is not on that account relieved from liability for his negligence. We do not think that, under the circumstances disclosed by the evidence, decedent was required to know that the train was so long as not to be capable of being accommodated by the whole length of the side track, including that part upon the trestle, or that the engineer would push it so far. There is no evidence, moreover, that decedent was guilty of any want of care after he got upon the train that contributed to the accident which befell him. If there were either contributory negligence on his part or assumption of risk by him, it was in going upon the train at all, and in not refusing to undertake the service at the command or request of the conductor. (The defenses of assumption of risk and contributory negligence sometimes arise from the same facts, though the principles that underlie them are not the same.) Under circumstances like those of the present case, we do not think a court should go so far as to say, that an employee, who is himself in the exercise of due care and caution, must, in order to avoid "contributory negligence" or "assumption of risk" that would, in case of accident relieve his employer from liability, abandon the employment, even if his work could have been performed with safety by the exercise of due care and caution on the part of others, to the want of whose due care and caution the accident is attributable.

The view we take of the case presented by the record, in short, is this: The jury was warranted in finding that the situation maintained by the defendant below at the locus in quo of the accident, was not a reasonably safe one, according to the requirements of the law in that behalf, and as negligence of the master is never one of the risks assumed by the servant, the conclusion that defendant was guilty of negligence, or in other words, had failed in its duty to decedent, would inevitably follow, unless the affirmative defense is established, that decedent was fully informed as to the dan-

ger arising from such negligence, or that the same was so obvious that he ought to have been informed thereof; in which case, whether he be said to have assumed the risk, or have waived the negligence of his employer, or to have been guilty of contributory negligence in voluntarily exposing himself to such danger, the defendant is not liable. The determination of this fact was properly left to the jury, and we are not disposed to criticise the conclusion to which the jury in this case came, much less to say that it was one that should have been set aside by the court below. We cannot say, as a matter of law, that plaintiff was either guilty of contributory negligence, in not abandoning the train and refusing to occupy the station assigned him, or that, by remaining there under the circumstances disclosed by the record, he assumed the risk of the situation created by the plaintiff's default.

The decided cases dealing with the doctrines of assumption of risk and contributory negligence are very numerous. We have carefully examined those cited by defendant below, as well as many others, and do not find that the general trend of authority is at variance with the position here taken. The decision in each case must depend so largely on the facts and circumstances peculiar to it, that its ratio decidendi could only be fairly stated by reciting such facts and circumstances with what would here be embarrassing fullness.

The judgment of the court below is affirmed.

ARCHBALD, District Judge (dissenting). It was expressly decided in *Railroad v. Driscoll*, 176 Ill. 330, 52 N. E. 921, that a railroad company could not be convicted of negligence for failure to have a butt post or obstruction at the end of a stub switch by which cars would be prevented from going off, and that it was error to submit to the jury the question of the safety of the switch without it, or to admit evidence of the use of such posts by other roads. This case is squarely in point, and is based upon the doctrine announced in *Tuttle v. Railroad*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, that a railroad company cannot be compelled, according to the varying and uncertain opinions of juries, to adopt any particular contrivance or device in the construction of its road in order to be found in the exercise of ordinary care. See, also, *Twitchell v. Grand Trunk Railroad* (D. C.) 39 Fed. 419. But, without resting the case upon this, there are other considerations by which the same result is reached. The switch or siding where the accident occurred was not the property of the defendant company, although they frequently used it, but belonged to one Althouse, the owner of the coal yard into which it ran; and express permission for its use was obtained the day before by the request to have the gate left open. The company was not responsible, therefore, for the general character of the switch, but only for its use at the time in the condition in which it stood if it was not reasonably safe. But the fact is that it was not unsafe for any ordi-

nary and reasonable use, and the accident would not have occurred if proper care had been employed. It was the result not of running onto the switch, but of running off of it, and for this the company was not responsible. It was directly due to the negligence of the crew in charge of the train, as is plainly shown by the evidence, and the court, in my opinion, should have so declared it. A place or appliance provided by an employer for his employees is safe within the requirement of the law, when, not being inherently dangerous, it is safe if used with due and ordinary care, and for any extra hazard arising out of heedlessness in its use he is not to be held answerable. This is the doctrine that, as it seems to me, is applicable here. There was no negligence on the part of the company in directing the switch to be used, simply because the low trestle at its extremity had an unguarded end. That it had was obvious, if any precaution had been taken to see, and the company were not called upon to advise the trainmen of anything so manifest. 20 Am. & Eng. Enc. Law (2d Ed.) p. 94. They had a right to assume that they would use their own eyes and judgment. On the other hand, those in the immediate control of the train had no right to back into the obscurity and darkness of the coal yard without taking the precaution to know what there was at the end, nor to rely, as they apparently did, upon being brought up standing by some obstruction sufficiently massive to resist the force of the cars and moving engine. Every stub switch necessarily has an end, which in some cases is guarded and in others is not, as the evidence as well as common observation shows. Some extend into depots, freight houses, or other structures; some into yards; some end on trestles, as here; many stop simply where they happen to. In view of these uncertainties, and as a matter of ordinary prudence, it was the duty of the trainmen in this instance to know where they were going, and what was the condition of the switch at the end. The brakeman—plaintiff's husband—who was killed had a light, and was on the car that went over the trestle. Had the conductor, instead of turning his back and going into the office, or the other brakeman, whose whereabouts does not appear, been stationed so as to receive a signal from decedent when the end was reached, and repeated it to the engineer, the accident would not have occurred; and the failure to observe some such precaution must be regarded as its direct and proximate cause. It is not traceable, except in the remotest degree, to the order of the company to use the switch, for which they were alone responsible, and in which there was no negligence, but to the way in which that order was executed, and the attendant negligence of the decedent or his co-employees, for which the company cannot be justly held.

Entertaining these views, I think the judgment should be reversed.

EDWARDS v. CENTRAL OF GEORGIA RY. CO.*(Supreme Court of Georgia, Aug. 14, 1903.)*

[45 S. E. Rep. 462.]

Injury to Employee—Accident—Negligence and Contributory Negligence—Nonsuit.*

Where, in a suit against a railroad company by an employee for personal injuries, the plaintiff's evidence shows that the injury was the result of accident, or that, if there was any negligence, the plaintiff was not free from fault, it is not error to grant a nonsuit.

Bills of Exception.

Where, in the same case, each party sues out a bill of exceptions independent of the one sued out by the other party, and by consent the questions made by the two bills of exceptions are argued together, and this court, by an affirmance of the judgment on one of such bills of exceptions, disposes finally of the case so that a reversal of the judgment complained of in the other could be of no benefit to the plaintiff in error therein, the questions made by such latter bill of exceptions will not be considered.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; Paul E. Seabrook, Judge.

Action by H. L. Edwards against the Central of Georgia Railway Company. From a judgment of nonsuit plaintiff brings error, and defendant assigns cross-error. On main bill of error affirmed; on cross-bill dismissed.

Twiggs & Oliver, for plaintiff in error.

Lawton & Cunningham, for defendant in error.

SIMMONS, C. J. Suit was brought by Edwards against the Central of Georgia Railway Company for damages for personal injuries received by him while in the employment of the defendant as brakeman upon a freight train of the defendant. Upon the trial the jury found for the plaintiff, and the defendant brought the case to this court, which reversed the court below for refusing to grant a nonsuit. See 111 Ga. 528, 36 S. E. 810. After the plaintiff had amended his petition, the case was again tried. On this trial the plaintiff's evidence showed that he was injured while serving as brakeman on a freight train composed of about 50 cars. This train was behind schedule time, and was overtaken by a passenger train. Both trains were going west, and the freight train was approaching a siding. The east switch of this siding had been temporarily removed, and, in order for the freight train to take the siding, it was necessary for the train to be taken

*See note appended to *Alabama G. S. R. Co. v. Roach* (Ala.), 11 Am. & Eng. R. Cas., N. S., 869; *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622 (must be proximate cause of injury); *Norfolk & W. R. Co. v. Cromer* (Va.), 23 Am. & Eng. R. Cas., N. S., 720 (failure to furnish derailing switch and contributory negligence in running train at excessive speed); *Blackstone v. Central of Georgia Ry. Co.* (Ga.), 20 Am. & Eng. R. Cas., N. S., 365 (yardmaster knocked from train by pole too near track).

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past it, and then backed into the west switch. Just before reaching this latter switch, the plaintiff, who was standing on the tenth or twelfth car from the engine, was directed by the conductor to leave the train so as to change the switch. The train was moving seven or eight miles an hour, and the conductor, who was several cars back of the plaintiff, gave this direction by signals. The plaintiff descended the ladder on the side of the car and jumped to the ground. His foot slid into the frog of the switch, and he sustained very severe injuries. In getting down plaintiff saw no dangerous obstruction. The train was moving, and he did not know just where he would land, but he apprehended no danger save from a collision of the two trains. Just before jumping, plaintiff saw the switch stand on the other side of the track, and thought he had passed the frog of the switch. It was so dusty that plaintiff could not see clearly, but he could see as well as the conductor, and could see everything the conductor could see. Plaintiff thought he had passed the side track, and had clear ground to land on; but as to this he made a miscalculation. Plaintiff thought getting off was all right at the time, but was signaled so fast and so hurriedly that he had not time to think it over. If the conductor had not ordered it, plaintiff would not have left the train. He did not, however, think that he would jump into danger. Upon the close of the plaintiff's evidence, the court, on motion, granted a nonsuit. To this ruling the plaintiff excepted. The defendant also excepted, by a separate and independent bill of exceptions, (1) to the refusal of the court, upon the entry of the remittitur from this court, to enter an order which should operate as a grant of the motion for nonsuit made on the first trial, and (2) to the allowance of the amendment to the plaintiff's petition.

1. We are clear that there was no error in granting the nonsuit. It appears that upon the trial below the plaintiff announced that the only allegation of negligence upon which he relied was that wherein he alleged that the conductor was negligent in ordering the plaintiff to jump from the train. We think that this order was not negligent. The train was not moving rapidly, its speed being seven or eight miles an hour, and the conductor could not have foreseen that plaintiff would be endangered by leaving the train. The evidence does not authorize a finding that an injury would naturally follow jumping from the train under such circumstances. Another element supervened—that the plaintiff jumped at such time and place that his foot caught in the frog. Except for the presence of the frog at that exact place, the plaintiff would probably have received no injury. The coincidence of the plaintiff's landing at the exact point at which the frog was located would seem to have been an accident, to which no negligence on the part of the conductor contributed. Even if it be conceded, however, that the conductor was

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negligent in giving the order, still the nonsuit was right; for then the plaintiff was also negligent, and, being an employee, could not recover. In the first place, the evidence does not show that a collision with the passenger train was imminent. It was broad daylight, and the track was straight. The passenger train was plainly visible to those on the freight train, and it does not appear that the freight train was hidden from the view of those on the passenger train. The freight train was moving forward at a rate of seven or eight miles an hour. The evidence does not show that at this time the speed of the passenger train was greater; indeed, it does not negative the idea that those in charge of the passenger train had slowed up in order to allow the train in front to take the siding. Plaintiff's actions must, therefore, be considered without reference to the doctrine that an emergency may produce emotions which will excuse a lack of discretion on the part of the person endangered. Whatever may have been the obvious danger of jumping from the train, that danger was just as apparent to the plaintiff as to the conductor. It was no more negligent, under the evidence, for the conductor to give the order, than it was for the plaintiff to obey it. There is no evidence that the conductor knew more of the situation than did the plaintiff, or that he was more experienced in such matters. The plaintiff thought he had passed the switch, and believed he could jump safely, and land on clear ground. The conductor does not appear to have had any reason to believe to the contrary, except such reasons as were equally within the knowledge of the plaintiff. The jury could not lawfully have found from the plaintiff's evidence that the conductor was negligent in giving the order, without also finding that the plaintiff was negligent in obeying it, and that his negligence, no less than that of the conductor, contributed to the injury. Plaintiff was an employee of the defendant, and such negligence upon his part would preclude a recovery by him. In the cases relied upon by the plaintiff in error the negligence was not in giving the orders, but in some other particular, which made obedience to the orders result in injury. They would have applied in the present case if it had been shown that the defendant was negligent in having an unblocked frog at the switch, and the plaintiff had relied for a recovery upon the negligent failure to block the frog, in connection with the order to jump. As matter of fact, there was no effort to show that the defendant was negligent in having an unblocked frog, and the plaintiff's case rested solely upon the allegation of negligence in the order of the conductor. For these reasons the cases cited for him on this point have no application, and the court was right in granting the nonsuit.

2. The bill of exceptions of Edwards and that of the railway company were, by consent, argued together in this court. The affirmance of the judgment awarding the nonsuit on the

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second trial makes it entirely unnecessary to decide the questions made by the company's bill of exceptions, for a reversal thereon could not in any way benefit the company. The questions therein made will not be considered, for their decision would be utterly useless in this case. Indeed, the brief for the company states that, "If the judgment of the court below granting the motion for nonsuit on the second trial of the case should be reversed, then our bill of exceptions * * * would be vital." This would seem to indicate a willingness to abandon the bill of exceptions in the event of an affirmance of the judgment complained of by Edwards.

In one case judgment affirmed; in the other, writ of error dismissed. All the Justices concur.

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(*Supreme Court of South Carolina, July 28, 1903.*)

[45 S. E. Rep. 186.]

Injury to Employee—Wantonness—Punitive Damages.

Where, in an action for injuries to a servant, the complaint alleged that the injuries were caused by the wanton and willful acts of carelessness and negligence of the defendant, it authorized a recovery of punitive damages.

Same—Negligence—Question for Jury.

In an action against a railway company for injuries to a section master, evidence of defendant's negligence in using a defective brake, and negligent construction of a commercial siding, and failure to provide a derailing attachment, *held* to present a question for the jury.

Same—Wantonness—Question for Jury.

Where a railroad company, without inspection, placed a freight car, without a good and sufficient brake, on a commercial siding which was not provided with a derailing switch, and the car descended a down grade to the main line, and the company had been notified of the danger, and promised to remedy the defects, it could not be said, as a matter of law, that its acts were not wantonly reckless.

Same—Appliances—Defects—Notice—Liability—Instruction.

In an action for injuries sustained by a wild railroad car, an instruction that, if defendant permitted or authorized a shipper to handle a car in a defective condition, and by reason thereof injury resulted to a servant of the company without fault on his part, the company could not escape liability by claiming that the shipper was a third person, for whose acts the company was not responsible, when limited by instructions that the company did not warrant the safety or sufficiency of its cars, brakes, etc., and could only be held liable for injuries resulting from such defects when there was a failure on its part to exercise due diligence in providing appliances of a reasonably safe character, and maintaining the same in such condition, and that, if a railroad siding contained a defective switch, but its condition was reasonably safe, an employee could not recover for injuries caused by the escape of a car therefrom, if such escape was caused solely by a defect in the brakes, unless the evidence showed that such defect was known to the company's employees, or could have been known by the exercise of reasonable care—was properly given.

Appeal from Common Pleas Circuit Court of Kershaw County; Dantzler, Judge.

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Action by William E. Boyd against the Seaboard Air Line Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. H. Lyles and W. M. Shannon, for appellant.

M. L. Smith and J. T. Hay, for appellee.

JONES, J. The plaintiff, a section master of the defendant company, while returning on a hand car to his home at Bethune on November 8, 1900, was overrun by a wild freight car of defendant, which had escaped from the siding at Cassett, on the main line, and thereby sustained serious personal injuries, for which this action was brought. The jury rendered a verdict in favor of plaintiff for \$22,000, but, in consequence of an order for a new trial nisi, the plaintiff remitted from the verdict so as to reduce it to \$10,000, for which judgment was entered, from which comes this appeal.

1. The first and third exceptions and first division of the fifth exception question the ruling of the circuit court that the complaint, in the second cause of action, stated a cause of action for punitive damages. The seventh paragraph of the second cause of action begins with this language: "That the Seaboard Air Line Railway was wanton and reckless in this: in wantonly and recklessly," and then proceeds to state the misconduct complained of. The complaint is too long for insertion here, but the principal acts which were characterized as done wantonly and recklessly were: (1) Operating a freight car without workable brakes; (2) in failure to provide a derailing switch at the lower or northern side of the side track, notwithstanding the necessity therefor had been called to the attention of the defendant, and defendant had promised to remedy the defect. The seventh paragraph of the complaint concludes in these words: "That, in consequence of the wanton and reckless acts of carelessness and negligence of the said Seaboard Air Line Railway, the plaintiff demands as damages," etc. While the language last quoted, "wanton and reckless acts of carelessness and negligence," involves a contradiction in terms, since in strict speech there is no such thing as "wanton negligence" or "willful negligence," because conduct which is wanton or willful is not inadvertent—the element which characterizes negligence. But our legal nomenclature tolerates such expressions as willful or wanton negligence, and, so long as the meaning is understood, perhaps no harm can come from such inaccuracies. In the first part of this seventh paragraph of the complaint, however, the misconduct is not characterized as negligent or careless, but as wanton and reckless. Under numerous decisions of this court the complaint must be held to state a cause of action for punitive damages. *Watts v. R. R. Co.*, 60 S. C. 74, 38 S. E. 240; *Brasington v. Railroad Co.*, 62 S. E. 331, 40 S. E. 665, 89 Am. St. Rep. 905.

2. There was no error in overruling the motion for nonsuit,

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as complained in the second exception. This exception alleges absence of all evidence tending to show that the alleged defect in the brakes was known to, or ought to have been known to, defendant or its employees, or that said defect existed prior to the occurrence causing injury, or that said brakes were defective for the ordinary purposes for which said brakes were used. There was evidence tending to show that the car, with others, was placed on a siding at Cassett by defendant's agents about 12 o'clock on the day of the injury, for the use of Major S. R. Adams in shipping cross-ties from that point; that, in order to more conveniently complete the loading of the car with cross-ties lying near the lower end of the siding, Major Adams requested the agent at Cassett to have the car placed there, and was directed by the agent to "pinch" it down with scantling. Major Adams thus described how the car left the siding: "Q. The station agent told you to do that? A. He said I could do that; that I could pinch them, as it was downgrade. I worked at this until finally the cars began to move a little easier. The men dropped the scantling used as a pinch bar, put their shoulders to the car, and began pushing—got it on the slow motion. I was between the side track and the main line, and walked on down. In the meantime, when they got it in motion, I put a man on top. Now, I said to him, 'whenever I tell you to put the brakes on, apply them. I want you to stop fifty or sixty feet south of the clear post. He was up on the car, and the men were walking along. I saw the car begin to get more motion, and I said to him, 'Put on the brakes to ease it down.' He tried the brakes, and they would not work. I told him to try the other way, and see if not fastened. He tried. He could not move them. They would not move. They were not very rigid. I told him to hold back. The man remained on the car, and tried to put on the brakes, and could not hold it back. The car had 200 ties in it, and the momentum was getting greater all the time. When I found that he could not hold it back, I told him to stop it. They got everything in reach and put under the wheels, but they would roll over, or the wheels would split them off of the track, and we could not stop it. It kept going. Finally, it reached the clear post and passed it. I supposed the moment it struck the switch it would be derailed, but it went out on the main line. The man got off the car. The car was going at the rate of about four miles an hour. The men followed it 200 or 300 feet below the north gate switch. The car had reached the top of the hill, and begun going rapidly, and when they came back I notified the agent that the car had got away, and to wire both ways and let them know it was coming.'" Major Adams further testified that the brakes on the car were apparently in first-class condition, and that there was no indication of anything wrong with them until the attempt to apply them. But no one had particularly ex-

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amined the brakes after the car was placed in the siding. The fact, however, that the brakes could not be applied a few hours after the car was placed in the siding was some evidence that the defect existed when the car was placed in the siding, there being no evidence that the brakes had been in any way interfered with in the meantime. There was also evidence tending to show that the next morning after the injury the brakes were examined, and it was found that the brakes could not be made to close on the wheel. Section 2127, vol. 1, Civ. Code, requires that every railroad corporation shall cause a good and sufficient brake to be attached to every car used for the transportation of freight except four-wheeled freight cars, used only for that purpose. This duty, we think, involves the duty of reasonable inspection to see that the brakes attached remain good and sufficient for that purpose. There was evidence tending to show that the agent at Cassett had charge or control of the car in the siding, and had failed to inspect or test the brakes before directing the shipper, Mr. Adams, to "pinch" the car down to the lower end of the siding. The last evidence came out after the motion for nonsuit, but is properly for consideration of the court in determining whether to disturb the ruling on motion for nonsuit. *Hicks v. Railway Co.*, 63 S. C. 567, 41 S. E. 753. But, in addition to this, there was evidence tending to show that the siding was not merely a pass siding, but was also used as a commercial siding, and that a derailing switch should have been placed in such case, and there was no such switch. The plaintiff testified that he had previously notified the road master of defendant company of the absence of a derailing switch, and that he had promised to supply one. The testimony was to the effect that such a switch would have derailed the car, and prevented it from getting on to the main line.

3. The fourth exception is based upon the court's refusal to charge defendant's request "that there is no evidence of wantonness or willfulness in this case, and the jury cannot give punitive damages." We do not think there was such a failure of evidence as would have warranted such a charge; for, if there was any evidence at all from which an inference of wantonness could have been drawn by the jury, such a charge would have invaded the province of the jury. Whenever the evidence lies close to the dividing line between negligence which is gross and misconduct which is wanton or willful, it is right for the court to leave it to the jury to draw the proper inference. *Stembridge v. Southern Railway*, 65 S. C. 444, 43 S. E. 968. It could not be said as matter of law that it is not a reckless and wanton act for a railroad company, without inspection, to place a freight car, without a good and sufficient brake, on a commercial siding, without derailing switch, and with down grade to the main line, after express notice of the danger and promise to remedy.

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4. The second subdivision of the fifth exception presents the point that it was error to charge that punitive damages were recoverable where there was evidence of recklessness or wanton disregard of the rights of others, because it indicated that evidence of recklessness alone would entitle the plaintiff to recover such damages. This exception must be overruled, because an examination of the charge as a whole shows that the jury were repeatedly instructed that, to justify punitive damages, it must appear that the acts alleged were wantonly or willfully done. There may be a recklessness so great as to imply willfulness, and in such case punitive damages may be awarded. *Proctor v. Railway*, 61 S. C. 189, 39 S. E. 351; *Boyd v. Blue Ridge Ry. Co.*, 65 S. C. 330, 43 S. E. 817. In such sense only was the term "recklessness" used by the court when the entire charge is considered.

5. At plaintiff's request the court instructed the jury: "That, if a railroad company, through its agents or officers, permit or authorize a shipper to handle a car that is in a defective condition, and by reason thereof injury should result to a servant of the railroad company, without any fault on the part of the said servant, said railroad company cannot escape its liability by claiming that such shipper was a third person, for whose act in this respect the company was not responsible." The sixth exception alleges that this was error, "in that it amounted to a charge that such handling of a car in a defective condition, whether or not such defective condition was known to the railroad company, or could, with the exercise of reasonable diligence, have been known to the railroad company, would entitle the plaintiff to damages." The general proposition charged was correct, and was designed, no doubt, to meet the inquiry that might be raised as to whether the defendant could escape liability merely because the car was handled by a shipper. The limitations which appellant contends should have been made in this connection were fully covered in other portions of the charge made at appellant's request, as the following extracts will show: "That a railroad company does not warrant the safety or sufficiency of its cars, brakes, sidings, and roadways, and can be held liable for damages resulting from defects in any such appliances only when there has been a failure on the part of the company to exercise due diligence in providing such appliances of a reasonably safe character, or in maintaining the same in such condition." "That, even if a railroad siding has a defective switch, but the condition of the siding is such as to make it reasonably safe to use it, an employee cannot recover for an injury caused by the escape of a car from the siding, if such escape was caused solely by a defect in the brakes of the car, unless the evidence shows that such defect was known to the employees of the company having charge of the same, or could have been known to them by the exercise of reasonable care."

The exceptions are overruled, and the judgment of the circuit court is affirmed.

LOUISVILLE RY. CO. *v.* ANDERSON.*(Court of Appeals of Kentucky, Oct. 15, 1903.)*

[76 S. W. Rep. 153.]

Injury by Negligence—Fellow Servants.

Plaintiff, a laborer at a waterworks, was, while riding to his work with H., at his invitation, in a cart driven by him for C. in hauling dirt from the waterworks, injured by defendant's car striking the cart: *held*, on the claim that negligence of H. relieved defendant from liability, that H. and plaintiff were not fellow servants.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by John B. Anderson against the Louisville Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, for appellant.
Clayton B. Blakey, for appellee.

BURNAM, C. J. The appellee, John Anderson, lived on Kentucky street, between Sixth and Seventh, in Louisville, Ky., in July, 1901, and had been employed for several weeks as a laborer at the waterworks. Fred Hood resided in the same neighborhood, and was employed as a teamster by Mrs. Clark to drive a team of two mules hitched tandem to a dump cart, and was engaged in hauling dirt from the waterworks. For several days before the injury sued for in this action, Anderson had ridden from Hood's home in the city to the waterworks in a cart driven by Hood, at his invitation. In making the trip they crossed the track of the Louisville Railway Company at the intersection of Rogers street and Baxter avenue. On the morning of July 1, 1901, as they were crossing the track at a trot, one of appellant's cars coming at full speed struck the hind end of the cart, knocking it around, and throwing the appellee, Anderson, upon his head on the ground. The accident resulted in the fracture of two of appellee's ribs, and was followed by "traumatic" pneumonia, which very nearly resulted in his death. He brought this suit for damages, alleging that appellant's agents and servants in charge of the car which inflicted the injury did not use proper care in approaching the crossing, or give the usual and customary signals of their approach. The railway company, in its answer, denied negligence, and pleaded contributory negligence on the part of appellee. The trial resulted in a verdict for \$300 for appellee, and the defendant has appealed.

Substantially the only ground relied on for reversal is the refusal of the trial court to instruct the jury that, if they believe from the evidence that plaintiff's injury was caused or contributed to by the negligence of Hood, who was driving the cart, and the same would not have been received but for

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such negligence, they should find for the defendant. This instruction was asked upon the theory that both Hood and Anderson were working for the water company, one shoveling dirt and the other carting it away, and that at the time of the injury they were going together to their place of labor, and were fellow servants, and mutually responsible for each other's acts of negligence. We think this instruction was properly refused on two grounds: First. Because the testimony in the case does not bear out the contention that Hood and Anderson were fellow servants engaged in a joint enterprise at the time the accident occurred. On the contrary, we think it clearly shows that Anderson was riding in the cart simply as a guest at the invitation of Hood. Second. The testimony in the case entirely fails to show any negligence either on the part of Hood or Anderson which contributed to the accident. The verdict of the jury barely compensated appellee for loss of wages and necessary expenses incurred in the treatment of his injuries. We think the trial court properly overruled appellant's motion for a new trial.

Judgment affirmed.

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(*Supreme Court of Alabama, June 2, 1903.*)

[34 So. Rep. 1007.]

**Master and Servant—Injuries to Servant—Employers' Liability Act—
Railroads—Engineers—Acts of Fireman—Temporary Control.**

Plaintiff, an engineer, went under the engine while she was taking water, to repack a hot fire box. After the fireman had filled the water tank the engineer, while still under the locomotive, ordered him to move the reverse lever back three feet. The fireman misunderstood the order, and moved the locomotive back, injuring plaintiff: *held*, that the fireman under such circumstances was not in charge or control of the locomotive at the time, within Code 1896, § 1749, subd. 5, providing that where an injury to an employee is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any locomotive, engine, or train on the railway, the master shall be liable to answer in damages the same as if plaintiff was a stranger, and not engaged in such service or employment.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Peter F. Goss against the Louisville & Nashville Railroad Company to recover damages for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Walker, Tillman, Campbell & Walker, for appellant.
Bowman & Harsh, for respondent.

DOWDELL, J. This is a suit by the appellee, Peter Goss, to recover damages for personal injuries received by him

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while in the employment of the appellant railroad company as a locomotive engineer. The complaint contained two counts, but the case was tried alone upon the first count, which charged that the injury complained of was caused by the negligence of the defendant's fireman, and alleging that the fireman was a person in charge or control of the engine at the time the injury was inflicted. The plaintiff's right of action is based on subdivision 5 of section 1749 of the Code of 1896, known as the employer's liability statute, and the principal question here presented for our consideration and determination is whether, under the evidence in the case, the fireman was a person in charge or control of the locomotive, within the contemplation and meaning of the statute.

It has been decided by this court that, under certain circumstances and for certain purposes, the fireman of an engine may be in charge or control of it, within the meaning of the statute, as in the case of *Brown, Adm'r, v. L. & N. R. R. Co.*, 111 Ala. 275, 19 South. 1001, where the duties of the fireman required him to keep a lookout in the switching of cars, and to repeat to the engineer signals given to him, and to notify the engineer of the perilous position in which at any time the switchman might be placed, in that his relation to the switchman, under the peculiar facts, constituted the fireman a person in charge or control of the locomotive. And to the same effect is the case of *R. & D. R. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276. The principle deducible from these cases is that a fireman may be said to be in charge or control of an engine, within the meaning of subdivision 5, although the engineer be personally present on it, where, under the particular circumstances in its operation and movement, his duties as fireman require him to do that which is necessary to its proper and safe operation, and only to that extent. In such a case the negligent performance of the required duty, or the negligent failure to perform, resulting in injury to a fellow employee, would fix upon the master a liability, provided that with reference to the act producing the injury the person guilty of negligence occupied the position of one in charge or control of the machinery. The mere negligent performance of a duty by one in the service or employment of the master or employer, from which injury results to a co-employee, disconnected from the idea of being in the charge or control of the "signal points, locomotive, engine," etc., is not sufficient, within the meaning of the statute to impose liability upon the master or employer.

A fireman on a locomotive, under his ordinary or general duties as such, in his relation to the engineer, while the latter is present and in charge of the engine, cannot be said to be a person who has the charge or control. On the contrary, the engineer is the person in charge or control of the engine, and the fireman is subordinate in his position and relation.

The facts show that the plaintiff received his injury while

under the engine for the purpose of packing a hot fire box. The engine, with the train it was drawing, had stopped at a watering station, and while the fireman was engaged in the performance of his duty of replenishing the water supply in the engine's tank plaintiff went under the engine to repack the hot fire box. The necessary supply of water having been obtained, the fireman got down upon the ground by the engine, and close to where the plaintiff was, who was at the time under the engine. The plaintiff directed the fireman to get back on the engine, and move the reverse lever backwards, in order to raise the links so that he (the plaintiff) could get at the fire box to pack the same. In obedience to this order, the fireman got upon the locomotive, and in attempting to carry out the instructions to him the plaintiff was injured. The evidence is in conflict as to the instructions given by the plaintiff; the plaintiff testifying that he directed the fireman to move the reverse lever back three feet, which had no tendency whatever to move the locomotive, while the fireman testified that he understood the order to him to be to move the engine back three feet, and which he did. This conflict, however, we think is immaterial, as bearing upon the question as to who was the person in charge or control of the locomotive; for, whether the plaintiff's evidence or the fireman's be true, it is manifest that the fireman was acting under the direction and order of his superior, the engineer.

As to the duties of the fireman, the plaintiff testified as follows: "His duties gave him the right, in my absence, to stay in charge or control of the engine, and to perform any act that became necessary while he was in charge. The steam cock might have been knocked off in the cab. It would then have been his duty to have notified me about it, or to have seen that he did not allow the engine to start off—to see that no one else would start it, and to see that he didn't do it without my orders. He was in charge of the engine as it stood. He had not the right to move her or allow any one else to move her. It was part of his duty to watch the engine and to keep intruders off. He had no right to move the engine without my instructions or those of the persons in charge, and there was no one else in charge but myself.

* * * At the time of the accident I was under the engine, and the fireman in two feet of me, and, under these circumstances, the conductor has no right to tell the fireman to move the engine." Appellant's witness C. B. Gifford testified: "When the engineer is away from the engine, and the engine is standing still, the only duty the fireman has about the engine is to see the fire is kept up in the engine, and see that nobody interferes with anything about the engine, and to look after everything, and see that nothing is disturbed. When the engine is standing still, the fireman is simply a watchman of it."

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The facts without conflict show that the fireman was in the engine cab in obedience to the command of the plaintiff, and there to carry out the orders of the latter while he was under the engine for the purpose of packing the hot box. The fact that the engineer was under the engine while the fireman was in the cab did not change their relations, one to the other, as to authority and control. In point of superiority, the engineer was as much present and in charge and control of the locomotive as if he had been on his seat in the cab directing the fireman in the performance of some act. It is not in the power of the engineer, as long as he is present, by any act of his, to change the relationship between himself and the fireman, as to superior authority in the management and control of a locomotive, so as to fix a liability on the master for the negligent conduct of the fireman. The statement of the engineer that the fireman was in charge of the locomotive at the time of the accident can be regarded as nothing but the opinion of the witness, and the statement of an erroneous conclusion on the undisputed facts in the case.

The court erred in refusing the general charge requested by the defendant, and the judgment will be reversed, and the cause remanded.

Reversed and remanded.

WESTERN RY. OF ALABAMA v. ARNETT.

(Supreme Court of Alabama, April 14, 1903.)

[34 So. Rep. 997.]

Appeal—Review.

Errors assigned, but not argued, will not be reviewed on appeal.

Demurrers.

Where error was assigned to the sustaining of demurrers to pleas 2, 3, and 8, the assignment will be overruled if the ruling on any one of the demurrers was proper.

Injury to Employee—Defective Hand Car—Assumption of Risk.

In an action for injuries to a railroad trackman by being thrown from a hand car, alleged to have resulted from a defective brace, a plea that plaintiff had knowledge that the brace was insecurely fastened to the car, and, with this knowledge, rode on the hand car and assisted in propelling the same, was demurrable.

Same—Release—Fraud.

Where, in an action for injuries to an employee, plaintiff, in replication to a plea alleging settlement and a release, averred that such release was procured by misrepresentation and fraud, and that he was induced to sign the same shortly after his injury, while he was sick in bed, by the statement of defendant's agent that it was merely a written statement that he had no ill will against defendant, such replication stated sufficient facts to avoid the release.

Same—Same—Same.

Where plaintiff alleged that he signed a release without knowing what it contained, on defendant's misrepresentation as to its contents, and that the amount recited as the consideration therefor was tendered to him as a gift from defendant, a rejoinder alleging that plaintiff ought to have known the contents of the release, and that, with the

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duty to know, he never offered to return to defendant the consideration received therefor, was demurrable.

Same—Contributory Negligence—Knowledge of Defect.

In an action for injuries to a section hand while riding on a hand car, a plea alleging contributory negligence, in that while plaintiff was standing on the front end of the car, with his back in the direction the car was moving, he released his hold of the lever, and took hold of a brace, which he knew, or could have known, was insecurely fastened, and, by reason of such defect in the brace, plaintiff fell or was thrown from the car, etc., was demurrable for failure to postulate that plaintiff was negligent in taking hold of the brace, since the fact that he took hold of the same when he ought to have known it was loose was not negligence as a matter of law.

Same—Same—Evidence.

In an action for injuries to a section hand by his being thrown from a defective hand car, a question as to whether plaintiff's position at the time was the usual and customary position for a man to occupy, asked for the purpose of showing that plaintiff had not assumed an unusual and dangerous position, and not to establish a custom to justify an act negligent per se, was admissible.

Same—Evidence.

In an action for injuries to a section hand by being thrown from a hand car, a question, asked of defendant's foreman, as to whether it was possible for plaintiff to have fallen as he did if he had been riding behind the lever of the car, was improper, as calling for a conclusion.

Same—Same.

Where, in an action for injuries to a section hand by being thrown from a hand car, the foreman of the gang had testified that he had given orders that none of the men should stand in front of the lever to pull, it was proper to allow him to be asked on cross-examination as to whether he made any objection to the way in which the men were operating the car, or gave any orders as to the position they should occupy, on the occasion in question.

Same—Same.

In an action for injuries to a section hand by being thrown from a hand car, a question asked of defendant's foreman of the section gang, as to whether he had given them any orders on any other day than the day of the accident concerning the position in which they should stand, was properly excluded as too general and indefinite.

Same—Negligence—Insufficiency of Evidence.

Where, in an action for injuries to a section hand by being thrown from a hand car, the negligence charged was that of defendant's foreman in ordering brakes applied without notifying plaintiff, and the evidence showed that, when the car was within 30 yards of its destination, plaintiff's fellow employee applied the brakes suddenly, and plaintiff was thrown off, but there was no evidence that the foreman's directions for brakes was to apply them in any particular manner, or that there was any negligence in giving the order, the evidence was insufficient to establish the negligence charged.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by William T. Arnett against the Western Railway of Alabama. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The first count charges that while plaintiff was riding on a hand car and supporting himself by holding to a certain brace thereon one of the other section hands on said car, acting under instructions and direction of the foreman, negligently and without warning to the plaintiff, applied the brakes to

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the wheels of the said car, thereby suddenly checking the speed, by reason of which plaintiff's weight and body was thrown violently against said brace, causing said brace to turn, give way, or break, thereby precipitating plaintiff violently to the ground in front of said car, when said car then and there ran over plaintiff, etc.

The second count charges negligence of one S. I. Golden, section foreman, having superintendence and control of said car and the section hands thereon, in causing the speed of said car to be suddenly checked without warning to plaintiff, thereby causing plaintiff to fall and receive the injuries complained of.

The third count charges that the injury complained of was caused by reason of defects in the condition of said lever car on which plaintiff was riding, in that a certain brace or beam which had been used in supporting what is called a "running board" on said car, was insecurely fastened to said car; and by reason thereof said brace gave way, broke or turned, thereby precipitating plaintiff to the ground, from which he sustained the injuries complained of.

The fourth count charges negligence in general on the part of said Golden in operating, or causing to be operated, said car, without specifying any particular act of negligence.

The defendant demurred to each of the counts of the complaint, which demurrer was overruled, but under the opinion it is unnecessary to set out these grounds of demurrer; the ruling of the court not being insisted upon in argument.

The defendant pleaded the general issue and several special pleas, setting up contributory negligence of the plaintiff and other defenses. Among the pleas setting up contributory negligence were the following: "(8) For further answer to the third count of the complaint the defendant says that plaintiff had knowledge that the brace or beam therein referred to was insecurely fastened to said car, and with this knowledge he rode upon said hand car and assisted in propelling the same." "(14) And for further answer to the complaint and each count thereof separately, defendant says that plaintiff caused or proximately contributed to the injury complained of, in this: that while he was standing on the front end of said car, with his back in the direction in which said car was moving, said car was running at the rate of four or five miles an hour, and, while he was holding onto a lever and assisting in propelling said car, he released his hold upon the same, and stooped or squatted down and took hold of a certain beam or brace on said car, which he knew or by proper diligence could have known was loose, or insecurely fastened, and by reason of said defection in said brace or beam plaintiff fell or was thrown from the car and received the injuries complained of."

The fourth and fifth pleas were as follows: "(4) For further answer to the complaint defendant says that it has paid the

demand for the recovery of which this suit was brought before the action was commenced. (5) For further answer to the complaint the defendant says that for the alleged injury to plaintiff, to wit, on the 5th day of January, 1900, it compromised and settled any and all claim which plaintiff had against the defendant for said injury for a valuable consideration, and took his written release therefor, in words and figures as follows, to wit." Then follows a written instrument signed by plaintiff, which is a release and discharge in full of defendant for damages resulting from said injury; the consideration expressed being the payment to plaintiff of \$25, the receipt of which is acknowledged.

The plaintiff demurred to each of the special pleas. The demurrers to the second, third and eighth pleas were sustained. The ground of demurrer to the eighth plea was as follows: "(1) Said plea does not show when the plaintiff obtained knowledge that the brace or beam on said car was insecurely fastened. (2) Said plea does not allege or show that the plaintiff had been afforded a reasonable opportunity to inform the defendant or its agent of said defects."

The assignment of error based on the ruling of the court in sustaining the demurrers to pleas 2, 3 and 8 was as follows: "The court erred in sustaining plaintiff's demurrers to defendant's pleas numbered 2, 3 and 8."

The seventh and ninth pleas were stricken on motion of the plaintiff, but under the opinion it is unnecessary to set out at length these pleas or the motion.

To the fourteenth plea the plaintiff demurred upon the following grounds: "(1) It is not shown in said plea that plaintiff knew or had reason to believe that there was a safer and better way for him to perform his duty while on said car. (2) The fact that said car was suddenly jerked by the negligent act of the defendant's agent was not denied in said plea, nor does said plea set up any matter in avoidance of such allegation. (3) The facts set forth in said plea do not sustain the conclusion therein averred that the negligence of plaintiff proximately contributed to the injury complained of. (4) Said plea fails to aver that it was the duty of plaintiff to hold onto the lever or crank of said car at the time he received the injuries complained of. (5) Said plea does not show when the plaintiff obtained knowledge that the brace or beam on said car was insecurely fastened. (6) Said plea does not allege or show that plaintiff had been offered a reasonable opportunity to inform the defendant or defendant's agents of said defect. (7) Said plea is not an answer to the first count of the complaint."

The demurrer to the fourteenth plea was sustained. The demurrers to the pleas other than those just above referred to were overruled.

To the fourth and fifth pleas the plaintiff filed a general replication, taking issue thereon, and also the following

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special replications: “(1) And for replication to pleas 4 and 5, respectively, plaintiff says that shortly after he received the injuries complained of in his complaint, and while at his home confined to his bed on account of said injuries, and while suffering great and intense pain therefrom, an officer and agent of the defendant corporation came to plaintiff’s home, and stated to him substantially as follows: That one Smith, who plaintiff avers was then the president of the defendant corporation, desired to make plaintiff a present of twenty-five dollars; that plaintiff was a white man, and he felt sorry for him, and thereupon handed to plaintiff \$25 in money, and then and there stated to plaintiff that the defendant company would look after him when he got well, and give him a permanent job when he got up, and thereupon produced a paper which said officer or agent held in his hand, and requested plaintiff to sign. Plaintiff thereupon asked what the paper was, to which said officer or agent replied that it did not amount to anything; that it was simply a paper stating that plaintiff had no ill will or hard feelings against defendant company; that plaintiff did not read said paper and did not know the contents thereof, but, acting and relying upon the statements of said officer and agent, under the circumstances hereinabove set forth, signed the same. Plaintiff had no knowledge of the contents of said paper, and he signed no other paper purporting to be a release of said claim except as hereinabove mentioned, nor did he ever receive any money from the defendant in payment of his claim, nor has said claim ever been paid or satisfied in any way.”

To this replication the defendant demurred upon the following grounds: “(1) Because the matters therein set forth are not sufficient to avoid the legal force of the facts set forth in said pleas. (2) Because it attempts to vary by parol the terms and conditions of a written contract. (3) Because the facts therein set forth show that it was plaintiff’s duty to have read said paper before signing the same, and that he is bound by the same whether he read it or not. (4) Because it does not show that plaintiff could not by reasonable and proper diligence on his part have known the contents of said paper. (5) Because the facts therein set forth show that plaintiff is bound by the conditions of the paper that he did sign, whether he knew the contents thereof or not. (6) Because said replication does not show that plaintiff has ever offered to return to the defendant the consideration set forth in the release set up in said pleas. (7) Because it does not show that plaintiff could not read or was otherwise prevented from ascertaining the contents of said paper.”

The defendant filed the following rejoinder to the plaintiff’s special replication to pleas 4 and 5: “Comes the defendant and for rejoinder to plaintiff’s replication to pleas Nos. 4 and 5 says that plaintiff was a man of intelligence and education, and could read and write and was fully capable of making a

contract rationally, and that while in this condition he received the payment referred to in defendant's pleas Nos. 4 and 5, and executed the release set out in plea 5, and at the time he received it he either knew or ought to have known the contents of the said release set forth in defendant's plea No. 5, and defendant avers that plaintiff, with this knowledge or duty to know, has never offered to return to defendant the consideration received by him for the execution of said release." The demurrer to his rejoinder was sustained. Issue was then joined upon the pleas as stated in the opinion.

On the trial of the case the following facts were shown by the evidence without conflict: At the time of the injury complained of plaintiff was in the employment of the defendant as section hand on its road, and was under the superintendence, direction and control of one S. I. Golden, who was section foreman. Just preceding the injury to the plaintiff the foreman and the section hands started from their work over to the section house for dinner. For this purpose they boarded a hand or lever car. There were on this car Golden and the plaintiff, and four other section hands. The car was equipped with a lever which had two handles, one in front and one in the rear, by means of which the car was propelled. Two of the section hands used the rear handle of the lever, and the remaining three section hands, including the plaintiff, used the front handle of the lever. The other four section hands stood behind the lever handles, with their faces in the direction in which the car was going. The plaintiff stood between the two other section hands who were working the front handle of the lever, and his back was turned towards the direction in which the car was going. When within a short distance of the section house, where the car was to be stopped, the section hands ceased to propel the lever and took their hands therefrom. Thereupon the plaintiff squatted down from where he had been standing. It was while in this position that plaintiff fell off. The car ran over the plaintiff, breaking one of his legs near the hip joint, and inflicting other injuries. On the side of the car nearest which the plaintiff squatted down after releasing the lever handle, there was a brace or beam which was used to support a running board. The evidence of the plaintiff tended to show that after he had released the lever handle and stooped down in a sitting position, just before reaching the required stopping place, and while his back was turned to Golden, the section foreman, one of the section hands on said car, in obedience to instructions from said Golden, suddenly applied the brakes on said car without giving notice or warning to plaintiff, and that by reason of the sudden jerk thereby given the car plaintiff's body was thrown violently against the brace or beam on the side of the car, which brace or beam turned, or gave way, and plaintiff was thrown to the ground in front of the moving car; that the plaintiff's position and the condition of the

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car were well known to the foreman, Golden; and that there was no other feasible or safe place for the plaintiff to occupy while performing the duties required of him.

The evidence for the defendant tended to show that plaintiff was in the act of falling when the foreman, Golden, gave the order to apply the brake, and when the brake was applied; that the order was given for the purpose of preventing him from falling; that the proper place for him to have worked in propelling said car was behind the lever, with his face turned in the direction in which the car was going, and not in the position which he occupied. Defendant also introduced evidence tending to show that the sum of \$25 had been paid the plaintiff in full settlement and discharge of all damages therefrom by plaintiff for injuries sustained in falling from said car; that the plaintiff had executed to the defendant a written release, which was copied in the fifth plea and which was produced in evidence; and that at the time of the execution of this written release the meaning of the release and what was contained therein was explained to plaintiff by defendant's agent.

In rebuttal the plaintiff testified, and he also introduced other evidence tending to show, that he had never been paid anything by the defendant in settlement of his claim for damages against the defendant; that he had never executed a release or discharge of the defendant of said damages, and that, while he was in bed on account of said injuries, the general paymaster of the defendant came to his house and gave to him \$25 in money, stating that it was a gift from the president of the road, and that upon said paymaster asking him to sign a paper which was presented to him, and upon his asking said paymaster what it was, he was told that it amounted to nothing, and was a statement on the plaintiff's part that he bore no ill will towards the defendant; that the plaintiff did not read the paper, nor was it read to him, nor did he know its contents, but, acting on the statements made him by defendant's paymaster, he signed it.

Among the charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, was the general affirmative charge in its favor.

George P. Harrison, for appellant.

Gordon Macdonald and Crum & Weil, for appellee.

HARALSON, J. 1. The defendant demurred to the counts in the complaint, which were overruled. Errors are assigned for the overruling of these demurrers, but they are not insisted on in argument, and are therefore waived. The same is true of the ruling of the court in striking pleas 7 and 9, the basis of assignment of error numbered 4.

It may be said as to sustaining the demurrers to pleas 2, 3, and 8, that if any of the grounds were properly sustained, the assignment of error cannot be allowed, for the reason that it

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is not based upon these rulings severally, but upon them as a whole. Sustaining the demurrer to the eighth plea was good, and, therefore, the ruling sustaining the demurrers to the three pleas was without error. *Goodwin v. Whitehead*, 95 Ala. 409, 11 South. 65; *Kennon v. W. U. T. Co.*, 92 Ala. 399, 9 South. 200; *Coleman v. Pike County*, 83 Ala. 326, 3 South. 755, 3 Am. St. Rep. 746.

2. The fourth plea was payment, and fifth, that the defendant, before suit commenced on January 5, 1900, for a valuable consideration, compromised and settled all claim which plaintiff had against it for said injury. Said receipt is set out in full in the plea. The plaintiff replied, taking issue on the pleas, and specially, that said alleged compromise was procured by the fraud and misrepresentations of defendant. If the facts set up in this replication are true, the plaintiff, though he executed said receipt and acquittance, was not bound thereby. When the execution of a written instrument is procured by a misrepresentation of its contents, and the party is induced by such fraud to sign it when he did not know he was signing such an instrument, and which he did not intend to sign, the party so defrauded may avoid his signature, because of the fraud practiced upon him, notwithstanding he may have neglected to read the instrument, or have it read to him. But he must establish the fraud by clear and satisfactory proof. *Beck, etc., Co. v. Houppert*, 104 Ala. 503, 16 South. 522, 53 Am. St. Rep. 77; *The Bank of Guntersville v. Webb*, 108 Ala. 132, 19 South. 14; *Tillis v. Austin*, 117 Ala. 262, 22 South. 975; *Folmar v. Siler*, 31 South. 720.

3. Nor was there error in sustaining the demurrer to the rejoinder of defendant to plaintiff's special replication to pleas 4 and 5, for the reason, that the rejoinder sets up that the plaintiff "ought to have known the contents of the said release set forth in defendant's plea No. 5," and with the "duty to know, has never offered to return to defendant the consideration received by him for the execution of said release." Without knowing what the release contained, it was not binding on him. Moreover, the replication set up that the \$25 was a gift by defendant to plaintiff. If so, he was under no duty to return it.

4. Plea 14 was bad in that it does not postulate that the plaintiff was negligent in taking hold of the beam. The fact that he took hold of the beam, which he ought to have known was loose, was not negligence as a matter of law, and the plea does not allege it was negligence in him to do so.

The case was tried upon the several counts in the complaint, with general issue thereon, on pleas 6, 10, 11, 12 and 13, and on plaintiff's replication to pleas 4 and 5.

5. The plaintiff, when examined as a witness for himself, gave an account of the movements of the hand car from which he was thrown, and which he was assisting in propelling, the

while in the employment of the appellant railroad company as a locomotive engineer. The complaint contained two counts, but the case was tried alone upon the first count, which charged that the injury complained of was caused by the negligence of the defendant's fireman, and alleging that the fireman was a person in charge or control of the engine at the time the injury was inflicted. The plaintiff's right of action is based on subdivision 5 of section 1749 of the Code of 1896, known as the employer's liability statute, and the principal question here presented for our consideration and determination is whether, under the evidence in the case, the fireman was a person in charge or control of the locomotive, within the contemplation and meaning of the statute.

It has been decided by this court that, under certain circumstances and for certain purposes, the fireman of an engine may be in charge or control of it, within the meaning of the statute, as in the case of *Brown, Adm'r, v. L. & N. R. R. Co.*, 111 Ala. 275, 19 South. 1001, where the duties of the fireman required him to keep a lookout in the switching of cars, and to repeat to the engineer signals given to him, and to notify the engineer of the perilous position in which at any time the switchman might be placed, in that his relation to the switchman, under the peculiar facts, constituted the fireman a person in charge or control of the locomotive. And to the same effect is the case of *R. & D. R. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276. The principle deducible from these cases is that a fireman may be said to be in charge or control of an engine, within the meaning of subdivision 5, although the engineer be personally present on it, where, under the particular circumstances in its operation and movement, his duties as fireman require him to do that which is necessary to its proper and safe operation, and only to that extent. In such a case the negligent performance of the required duty, or the negligent failure to perform, resulting in injury to a fellow employee, would fix upon the master a liability, provided that with reference to the act producing the injury the person guilty of negligence occupied the position of one in charge or control of the machinery. The mere negligent performance of a duty by one in the service or employment of the master or employer, from which injury results to a co-employee, disconnected from the idea of being in the charge or control of the "signal points, locomotive, engine," etc., is not sufficient, within the meaning of the statute to impose liability upon the master or employer.

A fireman on a locomotive, under his ordinary or general duties as such, in his relation to the engineer, while the latter is present and in charge of the engine, cannot be said to be a person who has the charge or control. On the contrary, the engineer is the person in charge or control of the engine, and the fireman is subordinate in his position and relation.

The facts show that the plaintiff received his injury while

under the engine for the purpose of packing a hot fire box. The engine, with the train it was drawing, had stopped at a watering station, and while the fireman was engaged in the performance of his duty of replenishing the water supply in the engine's tank plaintiff went under the engine to repack the hot fire box. The necessary supply of water having been obtained, the fireman got down upon the ground by the engine, and close to where the plaintiff was, who was at the time under the engine. The plaintiff directed the fireman to get back on the engine, and move the reverse lever backwards, in order to raise the links so that he (the plaintiff) could get at the fire box to pack the same. In obedience to this order, the fireman got upon the locomotive, and in attempting to carry out the instructions to him the plaintiff was injured. The evidence is in conflict as to the instructions given by the plaintiff; the plaintiff testifying that he directed the fireman to move the reverse lever back three feet, which had no tendency whatever to move the locomotive, while the fireman testified that he understood the order to him to be to move the engine back three feet, and which he did. This conflict, however, we think is immaterial, as bearing upon the question as to who was the person in charge or control of the locomotive; for, whether the plaintiff's evidence or the fireman's be true, it is manifest that the fireman was acting under the direction and order of his superior, the engineer.

As to the duties of the fireman, the plaintiff testified as follows: "His duties gave him the right, in my absence, to stay in charge or control of the engine, and to perform any act that became necessary while he was in charge. The steam cock might have been knocked off in the cab. It would then have been his duty to have notified me about it, or to have seen that he did not allow the engine to start off—to see that no one else would start it, and to see that he didn't do it without my orders. He was in charge of the engine as it stood. He had not the right to move her or allow any one else to move her. It was part of his duty to watch the engine and to keep intruders off. He had no right to move the engine without my instructions or those of the persons in charge, and there was no one else in charge but myself.

* * * At the time of the accident I was under the engine, and the fireman in two feet of me, and, under these circumstances, the conductor has no right to tell the fireman to move the engine." Appellant's witness C. B. Gifford testified: "When the engineer is away from the engine, and the engine is standing still, the only duty the fireman has about the engine is to see the fire is kept up in the engine, and see that nobody interferes with anything about the engine, and to look after everything, and see that nothing is disturbed. When the engine is standing still, the fireman is simply a watchman of it."

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The facts without conflict show that the fireman was in the engine cab in obedience to the command of the plaintiff, and there to carry out the orders of the latter while he was under the engine for the purpose of packing the hot box. The fact that the engineer was under the engine while the fireman was in the cab did not change their relations, one to the other, as to authority and control. In point of superiority, the engineer was as much present and in charge and control of the locomotive as if he had been on his seat in the cab directing the fireman in the performance of some act. It is not in the power of the engineer, as long as he is present, by any act of his, to change the relationship between himself and the fireman, as to superior authority in the management and control of a locomotive, so as to fix a liability on the master for the negligent conduct of the fireman. The statement of the engineer that the fireman was in charge of the locomotive at the time of the accident can be regarded as nothing but the opinion of the witness, and the statement of an erroneous conclusion on the undisputed facts in the case.

The court erred in refusing the general charge requested by the defendant, and the judgment will be reversed, and the cause remanded.

Reversed and remanded.

WESTERN RY. OF ALABAMA v. ARNETT.

(Supreme Court of Alabama, April 14, 1903.)

[34 So. Rep. 997.]

Appeal—Review.

Errors assigned, but not argued, will not be reviewed on appeal.

Demurrers.

Where error was assigned to the sustaining of demurrers to pleas 2, 3, and 8, the assignment will be overruled if the ruling on any one of the demurrers was proper.

Injury to Employee—Defective Hand Car—Assumption of Risk.

In an action for injuries to a railroad trackman by being thrown from a hand car, alleged to have resulted from a defective brace, a plea that plaintiff had knowledge that the brace was insecurely fastened to the car, and, with this knowledge, rode on the hand car and assisted in propelling the same, was demurrable.

Same—Release—Fraud.

Where, in an action for injuries to an employee, plaintiff, in replication to a plea alleging settlement and a release, averred that such release was procured by misrepresentation and fraud, and that he was induced to sign the same shortly after his injury, while he was sick in bed, by the statement of defendant's agent that it was merely a written statement that he had no ill will against defendant, such replication stated sufficient facts to avoid the release.

Same—Same—Same.

Where plaintiff alleged that he signed a release without knowing what it contained, on defendant's misrepresentation as to its contents, and that the amount recited as the consideration therefor was tendered to him as a gift from defendant, a rejoinder alleging that plaintiff ought to have known the contents of the release, and that, with the

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duty to know, he never offered to return to defendant the consideration received therefor, was demurrable.

Same—Contributory Negligence—Knowledge of Defect.

In an action for injuries to a section hand while riding on a hand car, a plea alleging contributory negligence, in that while plaintiff was standing on the front end of the car, with his back in the direction the car was moving, he released his hold of the lever, and took hold of a brace, which he knew, or could have known, was insecurely fastened, and, by reason of such defect in the brace, plaintiff fell or was thrown from the car, etc., was demurrable for failure to postulate that plaintiff was negligent in taking hold of the brace, since the fact that he took hold of the same when he ought to have known it was loose was not negligence as a matter of law.

Same—Same—Evidence.

In an action for injuries to a section hand by his being thrown from a defective hand car, a question as to whether plaintiff's position at the time was the usual and customary position for a man to occupy, asked for the purpose of showing that plaintiff had not assumed an unusual and dangerous position, and not to establish a custom to justify an act negligent per se, was admissible.

Same—Evidence.

In an action for injuries to a section hand by being thrown from a hand car, a question, asked of defendant's foreman, as to whether it was possible for plaintiff to have fallen as he did if he had been riding behind the lever of the car, was improper, as calling for a conclusion.

Same—Same.

Where, in an action for injuries to a section hand by being thrown from a hand car, the foreman of the gang had testified that he had given orders that none of the men should stand in front of the lever to pull, it was proper to allow him to be asked on cross-examination as to whether he made any objection to the way in which the men were operating the car, or gave any orders as to the position they should occupy, on the occasion in question.

Same—Same.

In an action for injuries to a section hand by being thrown from a hand car, a question asked of defendant's foreman of the section gang, as to whether he had given them any orders on any other day than the day of the accident concerning the position in which they should stand, was properly excluded as too general and indefinite.

Same—Negligence—Insufficiency of Evidence.

Where, in an action for injuries to a section hand by being thrown from a hand car, the negligence charged was that of defendant's foreman in ordering brakes applied without notifying plaintiff, and the evidence showed that, when the car was within 30 yards of its destination, plaintiff's fellow employee applied the brakes suddenly, and plaintiff was thrown off, but there was no evidence that the foreman's directions for brakes was to apply them in any particular manner, or that there was any negligence in giving the order, the evidence was insufficient to establish the negligence charged.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by William T. Arnett against the Western Railway of Alabama. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The first count charges that while plaintiff was riding on a hand car and supporting himself by holding to a certain brace thereon one of the other section hands on said car, acting under instructions and direction of the foreman, negligently and without warning to the plaintiff, applied the brakes to

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the wheels of the said car, thereby suddenly checking the speed, by reason of which plaintiff's weight and body was thrown violently against said brace, causing said brace to turn, give way, or break, thereby precipitating plaintiff violently to the ground in front of said car, when said car then and there ran over plaintiff, etc.

The second count charges negligence of one S. I. Golden, section foreman, having superintendence and control of said car and the section hands thereon, in causing the speed of said car to be suddenly checked without warning to plaintiff, thereby causing plaintiff to fall and receive the injuries complained of.

The third count charges that the injury complained of was caused by reason of defects in the condition of said lever car on which plaintiff was riding, in that a certain brace or beam which had been used in supporting what is called a "running board" on said car, was insecurely fastened to said car; and by reason thereof said brace gave way, broke or turned, thereby precipitating plaintiff to the ground, from which he sustained the injuries complained of.

The fourth count charges negligence in general on the part of said Golden in operating, or causing to be operated, said car, without specifying any particular act of negligence.

The defendant demurred to each of the counts of the complaint, which demurrer was overruled, but under the opinion it is unnecessary to set out these grounds of demurrer; the ruling of the court not being insisted upon in argument.

The defendant pleaded the general issue and several special pleas, setting up contributory negligence of the plaintiff and other defenses. Among the pleas setting up contributory negligence were the following: "(8) For further answer to the third count of the complaint the defendant says that plaintiff had knowledge that the brace or beam therein referred to was insecurely fastened to said car, and with this knowledge he rode upon said hand car and assisted in propelling the same." "(14) And for further answer to the complaint and each count thereof separately, defendant says that plaintiff caused or proximately contributed to the injury complained of, in this: that while he was standing on the front end of said car, with his back in the direction in which said car was moving, said car was running at the rate of four or five miles an hour, and, while he was holding onto a lever and assisting in propelling said car, he released his hold upon the same, and stooped or squatted down and took hold of a certain beam or brace on said car, which he knew or by proper diligence could have known was loose, or insecurely fastened, and by reason of said defection in said brace or beam plaintiff fell or was thrown from the car and received the injuries complained of."

The fourth and fifth pleas were as follows: "(4) For further answer to the complaint defendant says that it has paid the

demand for the recovery of which this suit was brought before the action was commenced. (5) For further answer to the complaint the defendant says that for the alleged injury to plaintiff, to wit, on the 5th day of January, 1900, it compromised and settled any and all claim which plaintiff had against the defendant for said injury for a valuable consideration, and took his written release therefor, in words and figures as follows, to wit." Then follows a written instrument signed by plaintiff, which is a release and discharge in full of defendant for damages resulting from said injury; the consideration expressed being the payment to plaintiff of \$25, the receipt of which is acknowledged.

The plaintiff demurred to each of the special pleas. The demurrers to the second, third and eighth pleas were sustained. The ground of demurrer to the eighth plea was as follows: "(1) Said plea does not show when the plaintiff obtained knowledge that the brace or beam on said car was insecurely fastened. (2) Said plea does not allege or show that the plaintiff had been afforded a reasonable opportunity to inform the defendant or its agent of said defects."

The assignment of error based on the ruling of the court in sustaining the demurrers to pleas 2, 3 and 8 was as follows: "The court erred in sustaining plaintiff's demurrers to defendant's pleas numbered 2, 3 and 8."

The seventh and ninth pleas were stricken on motion of the plaintiff, but under the opinion it is unnecessary to set out at length these pleas or the motion.

To the fourteenth plea the plaintiff demurred upon the following grounds: "(1) It is not shown in said plea that plaintiff knew or had reason to believe that there was a safer and better way for him to perform his duty while on said car. (2) The fact that said car was suddenly jerked by the negligent act of the defendant's agent was not denied in said plea, nor does said plea set up any matter in avoidance of such allegation. (3) The facts set forth in said plea do not sustain the conclusion therein averred that the negligence of plaintiff proximately contributed to the injury complained of. (4) Said plea fails to aver that it was the duty of plaintiff to hold onto the lever or crank of said car at the time he received the injuries complained of. (5) Said plea does not show when the plaintiff obtained knowledge that the brace or beam on said car was insecurely fastened. (6) Said plea does not allege or show that plaintiff had been offered a reasonable opportunity to inform the defendant or defendant's agents of said defect. (7) Said plea is not an answer to the first count of the complaint."

The demurrer to the fourteenth plea was sustained. The demurrers to the pleas other than those just above referred to were overruled.

To the fourth and fifth pleas the plaintiff filed a general replication, taking issue thereon, and also the following

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was in charge of the defendant's switching engine at Westwego on the day of the fire. His direct testimony tended to show that the engine was in good condition and was provided with an arrester which made the emission of sparks impossible. On cross-examination he was asked how many times he had been to New York to testify what in his judgment was the standard among engineers for the best construction of locomotives, what route he took in traveling from New Orleans to New York and whether he had noticed, at night, any sparks from the locomotive that was pulling his train. These questions were objected to and the objections were sustained. A mere statement of the questions is sufficient to demonstrate their irrelevancy and immateriality.

Error in excluding evidence offered in alleged rebuttal is the subject of the plaintiffs' fourth ground of complaint. The simple question is whether the testimony offered was proper in rebuttal. If not, the judge in the exercise of his discretion was at liberty to exclude it.

After the defendant had closed its proof the plaintiffs sought to show that on the night of the fire the hydrants were blocked and the hose would not operate. This was clearly part of the plaintiffs' main case. The testimony was as available then as later in the trial and if they intended to rely upon the defective condition of the hydrants at the time of the fire as a ground of negligence they should have presented their testimony so that the defendant would have had an opportunity to answer it. No excuse for not doing so is suggested.

It is, perhaps, possible that, as the watchmen were employees of the defendant, the plaintiffs expected that they would be called by the defense, thus giving the plaintiffs the wide latitude of cross-examination. If this surmise be well founded, the plaintiffs, in the expectation of securing larger advantages, took the risk of losing what they possessed and have no reason to complain of the result. The trial judge had the entire situation before him and was much better qualified than an appellate court to determine whether the case could be reopened upon the new averment of negligence with justice to the defendant. He evidently thought that it could not be and there is no pretense that in so ruling there was any abuse of discretion.

The court was requested to charge that the failure of the defendant to call the watchmen as witnesses raised a presumption that their testimony would not have been favorable to the defendant. This proposition is argued as plaintiffs' fifth point. One of these watchmen was dead but his testimony had been previously taken and was accessible to both parties; in fact, the plaintiffs attempted to read it on rebuttal. Two others were actually present in the courtroom and the whereabouts of the fourth was not accounted for. They were employed by the Boylan Agency to guard the cotton on

defendant's premises and when the cotton was destroyed their connection with the defendant ceased; at least it does not appear that it continued. In these circumstances we are of the opinion that the plaintiffs were entitled to no more favorable charge than was actually given by the judge. He said:

"To withhold testimony which it is in the power of a party to produce, in order to rebut a charge against it, where it is not supplied by other equivalent testimony, may be as fatal as positive testimony in support or confirmation of a charge."

The last proposition argued relates to an alleged error in answering a question asked by the jury after they had retired to their room. The question was as follows:

"Did the judge charge that even if we found that there was negligence on the part of the defendant, we must find for the defendant unless that negligence caused the loss of this lot of cotton?"

The answer was "Yes, the court so charged."

This answer was in exact accord with the fact, he had so charged, the charge was correct and no exception was taken. It will be observed that the jury were not asking for new instructions, but were in doubt as to an instruction already given. It was, in legal effect, as if they had sent for a copy of the charge upon the point in question. After the judge had announced the answer which he intended to send to the jury counsel for the plaintiffs made the following request:

"I ask the court to charge that if the jury finds that there was negligence they must find a verdict for the plaintiffs unless they find that that negligence did not cause the loss."

After the jury has retired the functions of counsel cease and there should be no interference by them with communications between the jury and the court. It is too late to present additional arguments or new requests. Information of what takes place should not however, be withheld from counsel and they may enter an exception to any action of the court which they deem prejudicial to their client's rights. There is no pretense that the answer actually sent to the jury was erroneous and we might safely rest the decision upon the proposition that the court in such circumstances is under no obligation to adopt the language of counsel even though more accurate than his own. It is enough that the answer was correct.

An examination of the plaintiffs' request makes it apparent that it states negatively the instruction given by the court and presents a question of metaphysics which a jury would hardly pause to consider. The difference, from a practical point of view, is so unimportant as to become negligible. Were it necessary, however, to choose between the two propositions we should have little hesitation in selecting the one charged by the court, remembering as we must that the burden was unquestionably upon the plaintiffs to prove that the loss occurred through the negligence of the defendant.

It follows that the judgment must be affirmed with costs.

SCOTT v. SEABOARD AIR LINE RY. CO.*(Supreme Court of South Carolina, July 15, 1902.)*

[45 S. E. Rep. 129.]

Killing of Employee—Negligence—Sufficiency of Evidence.

In an action to recover for the death of an employee, where there was material evidence showing defendant's negligence, it was proper to refuse a nonsuit.

Same—Accident on Track—Care Due Watchman.*

An instruction, in an action for injuries to a railroad employee, that the railroad company owes no duty to one on its tracks, though it be a watchman whose duty is to watch over the track, except not to injure him in a wanton and willful manner, was properly refused.

Assumption of Risk.

An instruction that the assumption of risk by a servant does not mean that a person employed by the railroad assumes the risk of other employees, but he assumes the risk of his employment, and, where a person is employed and some other employee of the company injures him, he does not assume the risk of the other employee, is proper.

Appeal—Review.

An exception pointing out no specific error is too general to be reviewed.

Contributory Negligence.

Where there is no evidence to sustain the plea of contributory negligence, it is not error to refuse to charge on such issues.

Same—Pleading.

A general averment, in a plea in an action for injuries to a servant, that he was guilty of contributory negligence, is insufficient; the default constituting such negligence must be averred.

Appeal from Common Pleas Circuit Court of Richland County; Klugh, Judge.

Action by Donie E. Scott, as administratrix of James Daniel Scott, against the Seaboard Air Line Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Lyles & McMahan, Efird & Dreher, and E. McC. Clarkson, for appellant.

W. Boyd Evans, E. M. Thompson, and L. D. Melton, for respondent.

POPE, C. J. This action is directed to the recovery by the plaintiff, in her representative capacity, of damages for killing the intestate by the defendant, on the 30th July, 1901, while such intestate was employed as a watchman over the bridge and trestle work of defendant over the Congaree river, near the city of Columbia, S. C. The case was tried before his honor Judge Klugh and a jury. The verdict was in favor

*As to the degree of care due from a master, in furnishing safe place to work, see foot-note appended to *Southern Indiana Ry. Co. v. Moore* (Ind.), 3 R. R. R. 251, 26 Am. & Eng. R. Cas., N. S., 251.

As to the degree of care due from railroad company to employee, see generally, note appended to *McGeary v. Old Colony R. R.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 764.

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of the plaintiff for the sum of \$8,000. At the close of plaintiff's testimony, defendant moved for a nonsuit, which motion was denied. After the verdict the defendant moved for a new trial, on the grounds of insufficiency of evidence and that the verdict was excessive. Motion on both grounds refused. Judgment having been duly entered, the defendant then appealed to this court.

Before proceeding to a consideration of the grounds of appeal, we deem it proper to give a brief recital of the pleadings and testimony. After a proper allegation as to defendant's liability for the acts of the late South Bound Railway, the plaintiff showed that her husband, the late James Daniel Scott, at his death was survived by herself, as his widow, and his three children, naming each one; that he was employed by defendant's predecessor corporation as a night watchman over the Congaree bridge and trestle works adjacent thereto, setting out that his duties as such watchman required him to cross backwards and forwards over said bridge and trestle works of said railway to extinguish any fire that might appear thereon. That on the particular night of the tragedy, train No. 66, while running from the city of Savannah, Ga., to the city of Columbia, in this state, knocked the intestate from the trestle work on the Lexington side of the Congaree river, "negligently, carelessly, recklessly, and wantonly," in utter disregard of its duty and the safety of the said night watchman, without any headlight upon its engine, and without giving any signal or warning by bell or whistle or otherwise of its approach, as was its duty and custom to do, and without keeping any lookout whatsoever, and without any prudence or forethought which the engineer or person in charge of said engine should have kept upon the track where they knew said employee was at work, running at a rapid and reckless rate of speed, whereby the said intestate was killed. That his body was found thrown between two rocks, with his neck broken and his ribs were crushed and broken. Not only so, but the complaint further charged that no whistle was sounded or bell rung at the crossing by said railway over the public road near Cayces, S. C., which was about 200 yards from said bridge and trestle. And then followed the usual recitals of the loss in material support, society, etc., caused by the death of the said intestate.

The answer dealt in general denials, except, as a second defense, it used this language: "It denies each and every allegation of the complaint, and alleges that, if the plaintiff's intestate was killed by the locomotive and cars of the defendant, that he contributed thereto by his carelessness and negligence, and this defendant is not liable therefor."

The testimony of the plaintiff tended to show the corporate capacity of the defendant, and its employment for some nine months prior to the tragic death of the intestate as said night watchman at a salary of \$30 per month; that on the night he

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was killed the said intestate was seen with his lamp burning—that is, a lantern with a light burning therein—going to the bridge and trestle work; that intestate was passed on said bridge with his lantern still burning, going in the direction of the Lexington side of said bridge and adjacent trestle works, just before the train No. 66, consisting of an engine and passenger coaches, came upon said trestle work and bridge, on its way of Columbia, S. C.; that said engine was ahead of its schedule time, both on its arrival at the bridge and also on its arrival at the depot in the city of Columbia, S. C.; that said engine had no headlight thereon; that the engineer and fireman on the engine, while on the bridge, were seen with their faces turned to each other in close conversation; that said engine did not slacken its speed on its approach to said bridge and trestle, but was being run at the rate of 50 or 60 miles an hour; that there was no whistle sounded or bell rung either at Cayces or at or near the bridge; that a witness saw the intestate seem to swing his lantern, and that he barely escaped from death while on said bridge from the said No. 66 train by jumping onto a little platform on the bridge, where barrels of water were constantly kept; that, after train No. 66 had passed this witness, he went across the bridge and trestle works to where he had seen the night watchman swing his lantern, and at or near the trestle works he found the lantern, and when he called out for the watchman he received no reply; that on the next morning another witness, at about the hour of 6 o'clock, found the remains of the night watchman, with his neck broken and the whole right side crushed, every rib being broken; that physician testified that such bruises could have been and likely were caused by a collision of the bumper near the cattle guard of the engine with the body of the deceased. These matters of testimony were before the circuit judge when he refused the motion for nonsuit. The defendant then offered testimony tending to establish that the engine had a headlight fully lighted; that the whistle of the engine was blown near Cayces; that the speed of the train was 20 to 30 miles an hour; that, instead of being ahead of time when the train reached the bridge and trestle, it was a little behind time, etc. We will now dispose of defendant's grounds of appeal:

1. Because his honor erred in refusing, upon motion, to strike out so much of the testimony of the witness J. J. Mims as included the facts, stated by him, that there was a rule of defendant company which required a signal to be blown on approaching the bridge across the Congaree river, because the said testimony was oral testimony as to the contents of a written instrument, and was hearsay and incompetent. J. J. Mims, a witness for the plaintiff, was being cross-examined by the defendant, and during that cross-examination had stated that it was a rule of the railway company to blow the whistle before going on a trestle, but finally admitted that he had

never seen any such rule. Therefore, defendant moved that the testimony of this witness as to a rule to blow before crossing be struck out. The court said: "I don't think there is any need to strike it out. You may strike it out so much as he said about the rules of the company." No doubt, the first words of the circuit judge were induced by the fact that the witness had just admitted before the jury that he never saw any such rule, and this, too, after he had first stated that there was such a rule. However, the judge finally said: "You can strike it out." We cannot see how the defendant received any prejudice hereby. This exception is overruled.

2. We will next consider the exceptions as to nonsuit. These are 2 and 5; the appellant abandoned his third and fourth exceptions. "(2) Because, upon a motion for a nonsuit, his honor should have held that there was not a scintilla of evidence to show that the deceased was killed by the railroad company's carelessness, and should have granted the motion." "(5) Because, on the motion for a nonsuit, his honor should have held that, if the duty of the defendant towards an employee on its track was that it would do him no harm through negligence, then there was no evidence tending to show negligence on the part of the defendant, as the deceased was not shown to have been in a position of danger, and from his position, as explained by the circumstances, must have been apprised of the approach of the train, and that no other inference could be drawn from the testimony." We cannot say, from our examination of the testimony, that there was no material testimony offered by the plaintiff going to show that defendant's carelessness had nothing to do with the death of the night watchman. Certainly, some of the witnesses for the plaintiff testified to matters which tended to establish this carelessness. Nor are we impressed with the fifth exception. We do not think the duty of the railway to its night watchman began and ended with doing him no harm by negligence. It owed him a positive duty to see that no harm came to him in discharge of his duty from either defendant's servants or machinery. Of course, this servant of the company assumed the risks usually incident to his position as night watchman. But this by no means allowed the defendant railway to jeopardize his life or limb by a disregard of all that caution which the railway should observe for his protection. There was testimony tending to show that the defendant had not discharged due care here, for if the testimony is believed, there was willfulness and wantonness here. These exceptions are overruled.

3. We will now examine the sixth exception, which is as follows: "(6) Because his honor refused defendant's third request to charge, as follows, to wit: 'An employee of the company, whose duty it is to supervise and keep the track in proper condition, has the right to pass over and along the track for the purpose of performing his duty, but he assumes

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the risks and dangers incident to a proper and reasonable conduct of the running of the trains,' but qualified it by adding: 'I charge you that. In this matter he assumes the risk that would extend to all lines of employment. It does not mean that a person employed by the railroad company assumes the risks of other employees. Other risks may overtake him, but he assumes the risk of employment. For instance, a man is employed to watch a bridge, and part of his employment requires him to go across that bridge; it makes no difference how high and what risk would be of his falling off the bridge—if he should incur an injury like that, that would be a risk assumed. Where a person is employed, and some other person comes along, an employee of the company, and injures him, he does not assume the risk of other employees'—thereby so restricting the said charge and limiting it to the risk of falling off the bridge; whereas, it is submitted that an employee assumes all the risks and dangers incident to his employment, and, in a case of this kind, he also assumes the risks incident to the running of trains in a proper and reasonable manner, and it was error in his honor to limit the risk to the aforesaid one source of danger.'" As will be seen by the language actually used by the circuit judge, he did not refuse defendant's third request. He said, "I charge you that." If there was any mistake made by the circuit judge, it was arising from his anxiety that the jury should not fail to understand what was included in the words, "he assumed the risks and dangers, etc." Hence he gave them a practical illustration of these risks incident to employment by supposing the instance of a watchman at a bridge. We do not see that the language of the circuit judge here complained of, when taken in connection with its general charge, could injure the defendant. This exception is overruled.

4. We will next refuse to pass upon exception 7, because it is too general. "(7) Because his honor refused to charge defendant's seventh request to charge, as follows, to wit: 'A railroad company owes no duty to one on its track, even though it be a watchman, whose duty it is to watch over the track, except not to injure him in a wanton and willful manner, if its agents have seen him.'" The appellant does not pretend to point out to us in what respect this refusal to charge is erroneous. The exception is overruled.

5. We will now examine the eighth exception, which is as follows: "(8) Because his honor refused to charge defendant's eighth request to charge, as follows, to wit: 'If you find that a train on this defendant's road did strike the deceased and thereby caused his death, you cannot find a verdict for the plaintiff, unless you further find that the agent of the defendant saw him, or should have seen him, and, after seeing him, then allowed its engine to strike him in wantonness and willfulness.'" Is not the exception objectionable because it is too restricted? Would not defendant's railway

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have been liable to plaintiff in damages for killing the intestate, and if it had been agreed that the trains would only run on schedule time, or that due notice of the approach of its trains should be given by ringing of the bell on the engine, or sounding the whistle to its engine, or by running its train at a slow rate of speed on its approach to the bridge and trestle? It seems to us that here are other words of liability except that around the request to charge. This being so, the circuit judge was not required to charge any such restriction of defendant's liability. This exception is overruled.

6. We will next consider the ninth exception, which is as follows: "(9) Because his honor refused defendant's ninth request to charge, as follows, to wit: 'If such employee fails to use proper and reasonable care to prevent an accident or injury to himself, and if such lack of care is the proximate cause of the injury, then recovery cannot be had for injury to him, even though the defendant was first negligent,' but qualified it by adding: 'If the injury was caused by deceased's own negligence, and that was the sole cause of the injury, the railroad company could not be held liable,' thereby indicating that the company would be held liable even if the injury was caused by contributory negligence of the plaintiff's intestate." We think this exception is not well founded. Even if we accept what the judge has said at this point alone, there has been no material injury to defendant. Of course, if the negligence of the plaintiff's intestate caused the injury, there could be no recovery. But, after a careful review of all the testimony in this cause, we cannot see where any negligence of the intestate is made to appear. He was where he was bound by his contract as night watchman to be. There is not a word of the testimony which indicates the slightest negligence on his part. Such a condition of affairs would have made this question a purely abstract one. It is no part of the duty of a judge to charge abstract propositions of law. This being so, the exception here considered must be overruled.

7. We will next pass upon the tenth exception, which is as follows: "(10) Because his honor refused defendant's eleventh request to charge, as follows, to wit: 'In all cases where the servant's want of ordinary care proximately contributes to his injury, he cannot recover, even though the master was guilty of negligence—a negligence of implied duties resting upon him.'" There is no testimony in this cause to show the positive action of intestate except in the line of his duty. There is no testimony as to any facts in connection with the intestate from which any inference may be drawn to his prejudice. But the circuit judge in his general charge held that, if defendant's negligence caused the injury, plaintiff could not recover. But, apart from these considerations, there is nothing in this exception to point wherein the judge was in error. This exception is overruled.

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8. Lastly, we will consider the eleventh ground of exception, as follows: "(11) Because his honor charged the jury as follows, to wit: 'As I said, the answer of the defendant alleges, if the deceased was killed by the cars, that he was guilty of negligence, and that the defendant is not liable therefor, but the answer does not raise the issue of contributory negligence; but I will say that the railroad company has got a right to come and say that the deceased was negligent and caused his own death, and, if they have proven that, the plaintiff could not recover, for a person cannot be guilty of negligence and recover; so, if you find that the deceased was negligent, and the negligence on the part of the deceased was the sole cause of his death, your verdict should be for the defendant,' thereby indicating that the jury could not find for the defendant in this case on the ground of contributory negligence, and thereby indicating to the jury that the answer of the defendant did not set up the plea of contributory negligence.'" Here is that part of the answer we must consider: "For a second defense, it denies each and every allegation in the said complaint, and alleges that, if the plaintiff's intestate was killed by the locomotive and cars of the defendant, that he contributed thereto by his own carelessness and negligence, and this defendant is not liable therefor." There is properly this inquiry just here: What is recognized under the decisions of this state as contributory negligence? In the case of *Cooper v. R. R. Co.*, 56 S. C. 95, 34 S. E. 16 (decided in 1899), our Supreme Court says: "The best definition of contributory negligence we have seen is the following, from 7 Enc. Law. 371 (2d Ed.): 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' It is thus seen that contributory negligence by a plaintiff can never exist except when the injury has resulted from the negligence of defendant as a concurring proximate cause." *Bowen v. R. R.*, 58 S. C. 228, 36 S. E. 590, and *Easler v. R. R.*, 59 S. C. 311, both sustain this definition of contributory negligence. In *Kennedy v. R. R.*, 59 S. C. 535, 38 S. E. 169, it is said: "Indeed, we may add that the defense of contributory negligence, so far from tending to deny or disprove negligence on the part of the defendant, necessarily involves, by the very meaning of the term 'contributory,' an admission of defendant's negligence, but the plaintiff's negligence, combining and concurring with the negligence of defendant, as a proximate cause thereof, has produced the injury complained of. See 7 Ency. of Law (2d Ed.) at page 371; *Cooper v. Railway Co.*, 56 S. C. 91, 34 S. E. 16; *Bowen v. Ry.*, 58 S. C. 222, 36 S. E. 590; *Sims v. Ry. Co.*, 26 S. C. 400."

It is the settled law of this state that, when contributory

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negligence is relied upon by defendant, it must be pleaded. To be a good plea, it must be well pleaded, i. e., the defendant must set out or admit its negligence, and seek to avoid its negligence by alleging negligence of the plaintiff as a proximate cause. There must be no alternative or conditional pleading. *Iseman v. McMillan*, 36 S. C. 36, 15 S. E. 336; *Hammond v. R. R.*, 15 S. C. 28; *Childers v. Verner*, 12 S. C. 8. In 5 *Ency. Pl. & Pr.*, at page 12: "Averment of Facts. In those states where it is incumbent on the defendant to plead contributory negligence specially, and where the defense cannot be made under a general denial, the trend of the authorities is that a general averment that the plaintiff was guilty of negligence which contributed to the injury, and that he could have avoided all damage by the exercise of proper care, is not sufficient. The acts and defaults constituting such contributory negligence should be averred." Thus it is manifest that, if the defendant intended in the second part of its answer to plead contributory negligence, it was not well pleaded.

But apart from these considerations, the defendants could not ask the circuit judge to declare the law of contributory negligence to the jury. The circuit judge properly declined to charge the same. Such a charge would have been a declaration of abstract law. There was nothing in the testimony offered either by plaintiff or defendant which showed that the plaintiff was at all negligent, or tended to show his negligence. Judges must adopt their charges so as to cover the issues of fact involved in the case and the law applying thereto. *Mercer v. Railway Co.*, 66 S. C. 246, 44 S. E. 750. This exception must be overruled.

It is the judgment of this court, that the judgment of the circuit court be and is hereby affirmed.

GARY, A. J., and JONES and WOODS, JJ., concur in the result.

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(*Supreme Court of South Carolina, Aug. 3, 1903.*)

[45 S. E. Rep. 203.]

Injury to Employee—Presumption of Negligence.*

Const. 1895, art. 9, § 15, providing that every railroad employee shall have the same remedies from the negligence of the corporation or its

*As to whether a presumption of negligence arises from the fact that an employee is injured, see foot-note appended to *Patton v. Texas & Pac. Ry. Co.* (U. S.), 20 Am. & Eng. R. Cas., N. S., 48; *Ketterman v. Dry Fork R. Co.* (W. Va.), 19 Am. & Eng. R. Cas., N. S., 445; *Lincoln St. Ry. Co. v. Cox* (Neb.), 4 Am. & Eng. R. Cas., N. S., 273; *Atchison, T. S. & F. R. Co. v. Tindall* (Kan.), 6 Am. & Eng. R. Cas., N. S., 557; *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755; *Wright v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 157; *Florida Cent. & P. R. Co. v. Burney* (Ga.), 6 Am. & Eng. R. Cas., N. S., 543.

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employees as are allowed by law to other persons, whether the injury arises from the negligence of a superior officer or a fellow servant engaged in another department of labor, while it confers a right, does not create a presumption or rule of evidence.

Same—Nonsuit.

A complaint in an action for the death of a railroad employee alleged that defendant was negligent in handling and overloading a freight train, and in carelessly managing the trains, and in shifting the meeting points of the trains. The evidence showed that the decedent, a flagman, was killed by the train running in the opposite direction from the one he was sent to flag: *held* that, as no negligence was alleged as to this train, a nonsuit was properly granted.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by W. L. Land, administrator of J. J. Land, against the Southern Railway. From judgment of nonsuit, plaintiff appeals. Affirmed.

Adam E. Welborn and C. J. Hunt, for appellant.

T. P. Cothran, for respondent.

WOODS, J. J. J. Land, plaintiff's intestate, was employed by defendant as a brakeman and flagman. On September 19, 1900, he was acting in that capacity on freight train No. 71, running from Greenville, S. C., to Atlanta, Ga. The train, in consequence of being overloaded, could not make its schedule time, and stalled upon a mountain grade near Ayersville. Land was sent back by the conductor to flag No. 65, another freight train, approaching from the same direction. The conductor left the flagman, took a portion of his train to Lula, Ga., and returned with the engine for the remainder. After attaching the engine to the remaining cars, he gave the whistle signal for Land to return; but on account of curve could not see whether he had reached the train. He waited from three to five minutes, then remarked he supposed Land had had time to catch the rear car, and ordered the train forward. The rules of the company require the flagman in such cases to go back a half mile to signal approaching trains. On the return trip to Lula, train 71 passed No. 72, another freight train, on the side track at Cornelia, four or five miles from the point on the road to which Land had been sent. After No. 71 passed it, No. 72 proceeded in the opposite direction, and ran over and killed Land. In the meantime, No. 65, the train which he had been sent back to signal, had stopped at Ayersville to allow No. 72 to pass. In consequence of the retarded progress of No. 71 from overloading, none of these trains passed each other at the places designated on the schedule. After No. 72 had gone on its way to Greenville, No. 65 moved out in the opposite direction, and its conductor found the remains of Mr. Land in a cut at about the distance from the place where the rear car of the stalled train No. 71 had stood that the rules of the company required him to go. The head was found on one side of the road, and

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the mangled body about 100 yards further on the other side. These are substantially the facts proved by the plaintiff. The circuit judge ordered a nonsuit, on the ground that there was an entire failure to connect the acts of negligence of the defendant alleged and proved with the death of plaintiff's intestate as a proximate cause. The plaintiff appeals from this order.

There is no allegation and no proof of negligence on the part of those who had charge of train No. 72, by which Land was killed. Nobody saw the accident, and no witness could tell how it occurred. The fact that the body of the flagman was found at about the place he should have been on the watch seems to indicate he did not hear the signal to return, or for some reason did not attempt to respond to it. Whether he fell inadvertently asleep from exhaustion, as defendant suggests, or, being intent on his duty of watching for the train he had been sent to signal, he did not hear the signal to return, and did not see or hear the train approaching from the opposite direction, it is impossible to say. The plaintiff contends negligence is presumed from the mere fact of defendant's killing a flagman, insisting that in this regard employees stand in the same position as passengers, under Const. 1895, art. 9, § 15: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work," etc. It is very clear this section confers a right; it does not create a presumption or a rule of evidence. Before the adoption of the Constitution of 1895, employees could not recover for injuries resulting from negligence of fellow servants. In this respect they belonged to an excepted class; passengers being at the other end of the line, and exceptionally favored. Putting employees in the same position as all other persons does not place them in the position of a specially favored class of persons. Hence, there is no foundation for the position that they are in the same class as passengers.

Taking the view of the evidence most favorable to plaintiff, he proved negligence of defendant: (1) In overloading train No. 71, on which Land was working. (2) In careless management of trains, in view of having an overloaded train to take care of, and prevent accident from its operation, this carelessness being indicated (a) by shifting the meeting points of trains, and (b) by not waiting long enough with train No. 71, after giving the signal, to allow the flagman to return to

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the train. Neither the overloading of the train nor the shifting of meeting points of trains can be regarded in any sense the cause of the accident. The most that can be said of these alleged acts of negligence is that they produced conditions which made it necessary for the flagman, in the discharge of his duty, to signal another train that his train was in the way of its progress. There was not the slightest reason for the conductor who ordered the flagman back to suppose he would incur any unusual peril in performing this duty. Nor was leaving the flagman without giving adequate time for him to return the proximate cause from which his death naturally resulted. The plaintiff proved the signal to return was duly given, as required by the rules. This signal released the flagman from his station, and if he regarded it, and started back to his train, he could not have failed to discover it had left, and that his duty to protect it from any other train was at an end. Before No. 72 reached him, the conductor of No. 71 had by the signal made him free to look out for his own safety. If he had been left in an uninhabited mountain in freezing weather, the danger being manifest, if death had come from cold, the negligence of leaving him might then be regarded the natural and proximate cause, so as to make the defendant liable; but being run over by another train is not a result to be anticipated from leaving him. If this occurs, it must be due to some independent carelessness or inevitable accident. The evidence is conclusive that the death of the flagman was too remotely connected with the negligence alleged and proved for this negligence to be regarded the proximate cause, and for this reason the nonsuit was properly granted. *Glenn v. R. R. Co.*, 21 S. C. 470; *Davis v. Same*, Id. 105; *Hill v. R. R. Co.*, 31 S. C. 397, 10 S. E. 91, 5 L. R. A. 349; 21 Am. & Eng. Ency. 495. Having reached this conclusion, it is unnecessary to consider separately defendant's exceptions to the refusal of the circuit court to sustain the demurrer to the complaint.

The judgment of this court is that the judgment of the circuit court be affirmed.

SOUTHERN RY. CO. v. JAMES.

(*Supreme Court of Georgia, Aug. 11, 1903.*)

[45 S. E. Rep. 303.]

Tort of Servant—Wantonness and Recklessness—Liability of Master.*

Where a servant does an act in the execution of a lawful authority given him by his master and for the purpose of performing what the master has directed, the master will be liable for an injury thereby inflicted on another, whether the wrong be occasioned by negligence or

*Liability of master for willful torts of servant, see foot-note appended to *Central of Georgia Ry. Co. v. Brown* (Ga.), 21 Am. & Eng. R. Cas., N. S., 561.

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by a wanton and reckless purpose to accomplish the master's business in an unlawful manner.

Case at Bar.

In the present case there was evidence from which the jury could find that the wrong done by the servant was done within the range of his employment, and for the purpose of accomplishing the business which the master had authorized him to do.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by H. James against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox and Harris & Chamlee, for plaintiff in error.

W. H. Ennis and Seaborn & Barry Wright, for defendant in error.

SIMMONS, C. J. It appears from the record that Saunders was the yardmaster, in East Rome, of the Southern Railway Company. He employed Ford as night watchman of the company, to look after the property and interests of the company in the East Rome yards, and for the purpose of arresting trespassers who were stealing or attempting to steal rides on the trains of the company which passed through those yards. It was also the duty of Ford to attend the switch lights in the yards. On the night of July 19 or 20, 1899, Ford caught James, the defendant in error, on the top of a box car, it being the purpose of James to steal a ride on the train. Ford ordered him to get down. He obeyed, and Ford arrested him. James resisted to such an extent that Ford had to call in assistance. Ford then started with James to the calaboose of the town, where it had been the custom to confine prisoners of this character. Ford testified that he made the arrest for the company, and as its employee. On the way to the calaboose James broke away from Ford and ran. Ford commanded him to halt, but James kept running. The night was dark, and Ford then, according to his own testimony, fired in about the direction in which James had run, not to hit him, but to frighten him, and cause him to stop, so that Ford could "arrest him and lock him up." The bullet from Ford's pistol struck James in one of his legs, which had to be amputated above the knee. James brought suit against the railroad company for the injuries thus received, and the jury, on the trial of the case, returned a verdict in his favor for \$500. The company moved for a new trial upon several grounds. The motion was overruled, and the company excepted.

The view we take of the case renders it unnecessary to discuss seriatim the grounds of the motion for new trial. All of them hinge upon the question as to whether, under the facts, the railroad is liable to James for the injury inflicted by

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its employee. That Ford was an employee of the company there is no doubt, the only doubt in the case arising upon the question whether the acts done by him were within the line of his employment. If they were, then under the law the defendant is liable; if they were not, but were simply the individual acts of Ford, the company is not liable. Our Civil Code (section 3817) declares that the master shall be liable for the torts of his servant when done in the prosecution and within the scope of his business, whether the same be by negligence or voluntary. Were the acts committed by Ford within the scope and range of the business for which he was employed, or in and about that business? Ford swears positively that Saunders, the yardmaster, employed him. During the negotiation prior to his employment Saunders asked him if he was afraid to arrest tramps. Ford replied in the negative. Saunders then told him he was to arrest all tramps or other persons stealing rides upon any of the company's trains coming into or going out of East Rome, and to take charge of them. What was the authority of Saunders to employ Ford for this purpose does not affirmatively appear from the record. The plea of the company denied his authority to employ Ford and authorize him to make arrests, but there was no evidence to support this plea. The evidence did show that Saunders employed the plaintiff and others and discharged others. It also showed that, after the employment of the plaintiff by Saunders, plaintiff was paid his salary by the railroad company. It also appeared from the evidence that Ford's predecessors in office had arrested persons stealing rides, and confined them in the calaboose until morning, when they were turned over to the state officers. This was sufficient, we think, to authorize the jury, in the absence of evidence to the contrary, to infer that Saunders had authority to employ Ford as a night watchman, not only to watch over the company's property, but to make arrests for the company. It is also proper to note that there is a statute of force in Georgia making it a penal offense to steal a ride upon a railroad train.

It was argued, however, by the learned counsel for the plaintiff in error, that, even if Ford had authority to arrest James, he had no right to imprison him, or to shoot him on the way to the prison. While there was no evidence to show that Ford was expressly instructed to confine his prisoners in the calaboose, there was evidence that his predecessors had done so. Even in the absence of proof of such a custom, we think the authority to confine the prisoner necessarily followed the authority to arrest. This was one of the incidents of the arrest. If Ford could not imprison one arrested, what was the use of the arrest? The town marshal was shown not to be on duty at night, and some disposition had to be made of the prisoner. It could not have been expected that Ford would personally hold his prisoners all night and neglect his

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other duties. To tie them or lock them up at the yards could scarcely have been expected of him, nor would either of these methods have required less authority than to confine the prisoners in the town calaboose. The calaboose was the proper place to put them in until they could be turned over to the state's officers to be held for trial. We hold, therefore, that the authority to arrest carried with it the authority to take the prisoner to the calaboose, and there confine him until he could be turned over to the proper officers. When an agent is authorized to do a thing, he has implied power to do all the acts necessarily incidental to doing the thing authorized.

Having shown that Ford was authorized to arrest and imprison, the next question to arise is whether the company is liable for the injury which James sustained as a consequence of the shot from Ford's pistol. The Code section cited above declares that the master is liable for the torts of the servant within the scope of the master's business, whether such torts be negligent or willful. This seems to be the settled law in all the jurisdictions in this country in which the common law prevails. Where a master instructs a servant to do a lawful act, and the servant, while engaged in the master's business, and intending to do the act authorized, is reckless in the performance of the act, and inflicts injury on another, the master is liable. Webb's Pollock on Torts, 103. So, if the servant, acting in the way of his employment, and on his master's account, willfully and deliberately commit a wrong, the master is liable. Id. p. 109. See, also, Reinhard on Agency, §§ 485, 486. The rule is thus well stated by Hoar, J., in *Howe v. Newmarch*, 12 Allen, 49, 56: "The master is not responsible as a trespasser unless by direct or implied authority to the servant he consents to the wrongful act. But if the master give an order to a servant, which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant, in executing the order, makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an un-

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lawful manner." In the case now under consideration, the servant had full authority from the master to arrest the plaintiff. If made in a proper way, this arrest would have been entirely lawful. Indeed, the arrest was properly made, and was a lawful arrest. Acting still within his authority, and being still within the law, the servant undertook to imprison the person he had arrested. To do this it was necessary to take him to the calaboose, where he was to be confined. So far the servant was clearly within his authority, and did nothing which was illegal. In endeavoring, however, to take the prisoner to the place of confinement, when the prisoner broke away and ran, the servant negligently, recklessly, and wantonly fired in the prisoner's direction in order to frighten him into halting. The authority to make the arrest and to confine the prisoner implied the authority to use such force or violence as was necessary. The servant, through a want of judgment and discretion, used an unjustifiable amount and character of force and violence. He did so in an attempt to execute the authority to arrest and imprison, and the master is liable for the injury thus wrongfully inflicted upon the plaintiff. Counsel for the plaintiff in error laid much stress on the fact that the shooting of the plaintiff was a criminal act, and argued that it was, therefore, an act which could not be authorized. The arrest and imprisonment of persons violating the statute against stealing rides on railroad trains were, however, lawful acts, which could be authorized, and which were in fact authorized. The crime committed by the servant was in his injudicious attempt to execute this lawful authority in an unlawful manner. It was the means adopted by the servant for the purpose of performing the authorized work of the master. The civil liability of the master is not affected in such a case by the fact that the servant has rendered himself criminally liable. If the criminal act of the servant was done within the range of his employment, and for the purpose of accomplishing the authorized business of the master, the latter is liable. Applying these rules of law to the present case, there was evidence from which the jury could find that the defendant was liable for the injuries inflicted upon the plaintiff. See 20 Am. & Eng. Enc. L. (2d Ed.) 169-176; Noblesville, etc., Road v. Gause (Ind.) 40 Am. Rep. 224, and note; Smith v. L. & N. R. Co. (Ky.) 23 S. W. 652, 22 L. R. A. 72; note to Goodloe v. Railroad Co. (Ala.) 54 Am. St. Rep. 71; Higgins v. W. T. & R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Cooley on Torts (2d Ed.) 626 et seq.; Addison on Torts (Wood's Ed.) 46, § 36; Jaggard on Torts, 251 et seq.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

LEVINS *v.* NEW YORK, N. H. & H. R. Co.*(Supreme Judicial Court of Massachusetts, Suffolk, April 2, 1903.)*

[66 N. E. Rep. 803.]

Baggage—Money.*

Money carried by a passenger on a railroad train for use in purchasing a business, and not for traveling expenses, is not baggage, for the loss of which the railroad company would incur a carrier's liability.

Same—Same—Theft by Servant—Liability.*

Where a passenger on a railroad train keeps her money in her possession and under her control, and it is lost or stolen when left momentarily by her on a window sill of a car, the company cannot be held responsible as a bailee.

Same—Same—Same.*

A railroad company cannot be held responsible for the theft, by a porter in its employ, of money placed by a passenger on the window sill of the car, and momentarily forgotten.

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by Mary Levins against the New York, New Haven & Hartford Railroad Company. There was a verdict ordered for defendant, and plaintiff excepted. Exceptions overruled.

Plaintiff was a passenger riding on a pass and special ticket on one of defendant's parlor cars. She had with her a purse containing some \$400, which she intended to use in buying an interest in a business in New York. During her journey she left her seat and went into the toilet room of the car, and laid her pocketbook on the window sill, which she forgot on coming out, but immediately remembered, and went back to the toilet room for it. She found the door locked, according to her testimony, and the porter came out a moment later, and the pocketbook was gone. Plaintiff charged the porter with having stolen it, but he denied all knowledge thereof, and was searched without result.

Geo. R. Swasey and Wm. P. Thompson, for plaintiff.

John L. Hall, for defendant.

HAMMOND, J. The evidence is conclusive that the money lost was not intended to be used for traveling expenses, but for an entirely different purpose. The plaintiff was upon the train, going to her home in the city of New York. She had a pass and a special ticket, upon both of which she relied to get there. She testified that the money had been obtained by a recent sale of certain property in New York, belonging to her mother; that her mother had consented that she might use it in the purchase of an interest in the business of one Snyder in New York; and that it was "not at all" for traveling expenses, but that she intended to use it for the

*Whether money constitutes part of baggage, see monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., i.

purpose of going into business. The money, therefore, was not baggage, within the legal meaning of that term as used in this connection; and as to it the common-law liability of a common carrier was not upon the defendant. *Jordan v. Fall River Railroad*, 5 Cush. 69, 51 Am. Dec. 44; *Dunlap v. International Steamboat Co.*, 98 Mass. 371, and cases cited. Nor was the money intrusted to the defendant. It was kept within the exclusive control of the plaintiff. The defendant was not even a gratuitous bailee. In a word, the money was not baggage, nor was it under the care or in the possession of the defendant. Neither as a common carrier nor as a bailee did the defendant assume any care whatever over it; nor with respect to it did it owe any legal duty, as such, to the plaintiff. The contract between the plaintiff and the defendant did not cover the money, and the legal relation of the defendant to it after the contract was no other than before. In this respect the case is clearly distinguishable, on the one hand, from that numerous class of cases in which the article lost was baggage, within the meaning of the term as used in this connection in which cases the common-law liability exists, and, on the other hand, from the class of cases, perhaps equally numerous, where the property is delivered into the possession of the carrier, in which cases a liability arises from the bailment. If, therefore, the money had been stolen by any person other than the defendant, or some one of its agents or servants, it could not have been said that the loss was in any way attributable to a failure of duty on the part of the defendant.

It is contended, however, by the plaintiff, that the jury would have been justified in finding that the money was stolen by the porter, one of the servants of the company; and she insists that in such a case the defendant would be liable. Assuming, in her favor, for the purposes of the discussion, that the jury might properly have found that the porter stole it, we do not think that the defendant could have been held liable for the act of the porter. It is true that where there is a duty to be performed by the carrier with reference to the persons or property of a passenger, and there has been a failure to perform it, the fact that the failure arose from a positive act of a servant to whom the carrier had delegated the performance of the duty is no defense. A familiar instance is where a passenger is willfully assaulted by a servant to whom the carrier has delegated the duty of using proper care to prevent such an assault. Such a case differs from that where the assault is committed by a servant acting within the scope of his employment, as in *Moore v. Fitchburg Railroad*, 4 Gray, 465, 64 Am. Dec. 83, and the carrier is held, not upon the ground that the assault was committed by his authority, but upon the ground that he failed to exercise his duty to protect the passenger, and hence the declaration in such a case is not for an assault, but for a failure to prevent one. *Bryant v.*

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Rich, 106 Mass. 180, 8 Am. Rep. 311. Such being the ground of liability, it can make no difference by whom the assault was committed, provided there be negligence shown in the performance of the duty respecting the protection of the passenger.

The plaintiff has failed to show any legal duty resting upon the defendant as to the care of this money lying upon the window sill where the plaintiff placed it. It was not within the scope of the employment of the porter to make any new contract, or to modify one already made. He had a very limited duty as to the performance of contracts already made, and the duties of the defendant arising therefrom, and there his power to represent the defendant stopped. If he stole the money, he, and not the defendant, was the thief, and the act was not the result of any failure of the defendant to discharge its duty. There is no ground upon which the defendant can be held. For similar cases in other jurisdictions, see *Illinois Central Railroad v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York Central Sleeping Car Co.*, 28 Mo. App. 199.

The conclusion to which we have come upon this ground of the defense renders it unnecessary to consider the others, some of which seem quite formidable, upon which the defendant relies.

Exceptions overruled.

NORFOLK & A. TERMINAL CO. v. MORRIS' ADM'X.

(*Supreme Court of Appeals of Virginia, June 11, 1903.*)

[44 S. E. Rep. 719.]

Trial—Reception of Evidence.

The order in which evidence is introduced is a matter largely in the discretion of the trial court, and its judgment will not be reversed because evidence proper in chief was introduced in rebuttal.

Street Railways—Receiving Passengers—Degree of Care.*

It is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars.

Conflicting Evidence.

Where the jury is properly instructed, its verdict upon conflicting evidence will not be disturbed.

*As to the liability of carriers for injuries to passengers from jerks or jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co.* (Mo. App.), 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584; foot-note appended to *Illinois Cent. R. Co. v. Vinson* (Ky.), 8 R. R. R. 264, 31 Am. & Eng. R. Cas., N. S., 264; monograph, 4 R. R. R. 536, 27 Am. & Eng. R. Cas., N. S., 536.

As to duty to allow passenger reasonable time to get on train or car, see monograph, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904; *Betts v. Wilmington City Ry. Co.* (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602.

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Error to Law and Chancery Court of City of Norfolk.

Action by the administratrix of Morris against the Norfolk & Atlantic Terminal Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The third instruction given by the court is as follows: "The court further instructs the jury that it is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars; and if they believe from the evidence that the defendant company started its car when the decedent, Robert Morris, was lawfully entering the said car, and before he could get into a place of safety thereon, and that the fact that said decedent was so entering said car and had not gotten to a place of safety thereon at the time it was started was known to said defendant or its servants, or could have been known to them by the exercise of the greatest care, and that his death was caused by the failure of said defendant to exercise such care, then they should find for the plaintiff, unless they should believe from the evidence that said Morris was guilty of negligence which contributed to the injury."

Harry L. Lowenberg, for plaintiff in error.

Green, Withers & Green, for defendant in error.

KEITH, P. Morris' administratrix sued the Norfolk & Atlantic Terminal Company to recover damages for the death of her intestate, which it is alleged was caused by the negligence of the defendant company. There was a verdict and judgment against the company, to which, upon its petition, a writ of error was awarded.

The first error assigned is to the ruling of the trial court under the following circumstances:

The defendant company, to maintain the issue upon its part, introduced George C. Reid, who, having been examined in chief, upon cross-examination by plaintiff's counsel was asked the following question: "Did this car give any signal before it started?" Defendant objected to this question on the ground that it referred to a matter not testified to by witness on direct examination, whereupon counsel for plaintiff said they would make witness their own. Defendant then objected on the ground that it was not the "proper time for the introduction of other witnesses on behalf of plaintiff, as defendant was not through with its witnesses, and that in no event could plaintiff introduce other witnesses to testify except in rebuttal." These objections were overruled, and the witness was permitted to answer the question.

This is no ground for reversal. In *Flick v. Commonwealth*, 97 Va. 766, 34 S. E. 39, it was held that the order in which evidence is introduced is a matter largely in the discretion of the

trial court, for which this court will not reverse the judgment of the trial court save in very exceptional cases. It will not reverse merely because evidence proper in chief was introduced in rebuttal.

The second bill of exceptions is to the action of the court in granting certain instructions asked by the plaintiff and in refusing those asked by the defendant.

The petition of plaintiff in error in its assignment of error with respect to the instructions makes specific objection only to the second and third of those given by the court, and refers in general terms to the sixth instruction asked for by the defendant as stating the law correctly. The instructions given to the jury will appear in the report of the case. They involve no principle that has not been time and again dealt with by this court, and we do not deem it necessary to advert to them further than to say that they fairly and correctly state the law of the case in every aspect presented by the evidence.

The sixth instruction asked for by the defendant company above referred to is in the following words:

"The defendant company was bound to have its cars stop a reasonable time at its Sewell Point terminus to allow passengers to get on the same; but, if its cars did so stop, it was not bound to look after the movement of all of its passengers and of said R. R. Morris, but that said passengers and said R. R. Morris were presumed by the law to take care of themselves and avail themselves of the reasonable opportunity to board the cars which was afforded them."

It was not error to refuse this instruction. It does not correctly state the duty of the defendant company to its passengers in getting on its cars, but the law upon that branch of the subject is well stated in the third instruction given by the court.

The defendant company moved the court to set aside the verdict and grant a new trial, and its refusal to do so constitutes the remaining assignment of error.

The evidence tends to prove the following state of facts: The Norfolk & Atlantic Terminal Company owned and operated a railway line from the city of Norfolk to Sewell's Point. Its terminal at Sewell's Point is at the end of a large pier several hundred feet in length. At the end of its track on this pier, and on the southern side thereof, there is a coal bin. Between the coal bin and the side of a car standing on the track there is a space of about 12 to 18 inches. On the northern side of the track is a warehouse. Between the warehouse and track there is a space of from 12 to 15 feet, from which passengers usually get on board the cars. On the 9th of June, 1901, between 7 and 8 o'clock p. m., a closed motor car, to which was attached an open trail car, stood at this terminus for several minutes, waiting to re-receive its passengers. There was quite a crowd gathered, seeking to take the train on its return trip to Norfolk. Among them was

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R. R. Morris, who was thrown from the car when it started and sustained injuries from which he died on the evening of the next day.

There was, as we have said, quite a crowd seeking transportation to Norfolk. There is evidence which strongly tends to prove that the car started without a proper signal, and with an unusual and violent jerk; and the jury, by its verdict, have established as true all that the evidence tended to prove in support of the verdict. Upon every point of interest in the case there is a conflict of testimony. This is true not only as to all the facts relied upon to establish the negligence of the company, but it is equally true with respect to evidence which tends to prove contributory negligence of the plaintiff's intestate.

It is claimed on the part of the company that the cars were filled to overflowing; that Morris was warned not to attempt to board the cars, and that when he had done so he was ordered to get off. But here we are again confronted with a conflict of the evidence. It is true that the crowd was great and pressing, but it is impossible for the court to say under the circumstances of this case that it was contributory negligence for Morris to get upon it. All that this court can do in such a case is to see that the jury is properly instructed, and that the testimony, considered as upon a demurrer to the evidence, is sufficient to support the verdict. With this our duty ends, and the law leaves the protection of the litigant to the jury under the supervision of the trial court.

It may be thought that we have dealt somewhat summarily with this case, but there is nothing of novelty in the law which it involves, and a discussion of the facts would be unprofitable.

The judgment is affirmed.

STATE *ex rel.* SHEETS, Atty. Gen., v. PITTSBURGH, C., C. & St. L. Ry. Co.

(*Supreme Court of Ohio, March 2, 1903.*)

[67 N. E. Rep. 93.]

Relief Associations—Contributions by Employees—Insurance.

An association, established by a railway company, composed of some or all of its employees and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employees who apply for membership in said fund and are admitted—the railway company to take charge of, and be responsible for, the funds, make up deficiencies in the same, supply facilities for conducting the business, and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company—is not an insurance company or association; and, in agreeing to perform and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business.

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Same—Same—Ultra Vires.

The said acts of the railway company are within the implied powers of a railway corporation, and are not ultra vires.

Same—Same—Public Policy.*

Nor are they contrary to public policy.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Quo warranto by the state, on the relation of J. M. Sheets, attorney general, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From an order dismissing the petition, relator brings error. Affirmed.

The plaintiff in error filed in the circuit court of Franklin county a petition in quo warranto against the railway company, now defendant in error, in which petition it is alleged that on or about the 28th day of August, A. D. 1890, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Chicago, St. Louis & Pittsburgh Railroad Company were consolidated under and pursuant to the laws of the state of Ohio, under the name of the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, whereby, under the latter name, it became, and still is, a corporation duly organized under and by virtue of the laws of the state of Ohio. It is further stated that the purpose of the incorporation of said company was to "acquire, build, maintain, and operate a line of railroad along certain lines and between certain points designated in its articles of consolidation and incorporation." The relator then charges that "in violation of law and in abuse of its corporate powers, and in the exercise of privileges, rights, and franchises not conferred upon it by law, the defendant, from and after the 1st day of October, 1890, has been engaged, and still is engaged, in transacting the business of life and accident insurance, whereby it insures its employees against sickness, accident, and death, in consideration of the payment, to wit, by the insured, of stipulated monthly sums, and an agreement on the part of such insured that in case of accident or death neither the insured, nor his legal representatives, shall be entitled to ask, demand, or receive, by suit or otherwise, any compensation whatever on account of such injury or death resulting from the negligence of the defendant or the Pennsylvania Company, or their servants or agents." The relator further states that "the profits, if any, growing out of said business of insurance, belong to the defendant, and the losses, if any, incident thereto, are borne by it." The prayer is for a judgment ousting the defendant from further continuing the business of insurance by means of its relief department, or in any other manner whatever. The defendant answered, admitting

*As to whether it is within the implied powers of a railway corporation to establish a relief association for the benefit of its employees, see *Maine v. Chicago, B. & Q. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 299; *Eckman v. Chicago, B. & Q. R. Co.* (Ill.), 9 Am. & Eng. R. Cas., N. S., 308.

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the official character of the relator, and that the defendant is a corporation duly organized in the manner, at the time, and for the purposes stated in the petition. Each and every other allegation of the petition is denied.

In the circuit court the parties agreed upon the following facts, and other facts which appear in the opinion:

"The parties to this cause, for the purpose of the trial of the issues made by the pleadings herein, agree upon the following facts, subject to exceptions by either party at the hearing for irrelevancy or incompetency:

"First. The printed pamphlet entitled 'Regulations governing the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh,' hereto attached, marked 'Exhibit A,' and made part hereof, is a true and correct statement of the organization, regulations, and mode of conducting the business of the relief department of the defendant, mentioned in the petition herein. The defendant has not been, from or after the said 1st day of October, 1890, and is not now, engaged in transacting the business of life and accident insurance, or either, unless the business set forth in said printed pamphlet should be held to be such life and accident business.

"Second. The defendant since about the said 28th day of August, 1890, has owned, and still does own, more than one thousand miles of railroad, and during said period has operated, and still does operate, more than twenty-three hundred miles of railroad, extending from the city of Pittsburgh, Pennsylvania, through the state of Ohio, to the cities of Cincinnati, Chicago, Indianapolis, and Louisville, with many branch lines, and, together with the lines of the Pennsylvania Company, mentioned in said petition, and of other companies mentioned in said regulations, forms one of the main systems of railroads between the Atlantic Seaboard and the Mississippi river."

The third fact agreed upon is a table showing the number of employees of the defendant company at the close of each fiscal year from June 30, 1890, to June 30, 1901, and the number of employees who at such times were actually members of said relief fund, and also shows the percentage of membership to the number of employees; the percentage being 47.7 in 1890, and 65.9 in 1901. The fourth fact agreed upon is a table showing the amount contributed by members during each triennial period, amount of benefits paid members during such period, and the operating expenses paid by defendant. The fifth and sixth facts agreed upon relate to amounts of benefit payments, according to certain regulations of the relief department.

Among sections of the regulations of this relief department above referred to under Exhibit A, the following are quoted as pertinent in this case:

"(1) The 'voluntary relief department' is a department of

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the service of the several railroad companies, respectively, associated as set forth in the agreement to which these regulations are attached, in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the general manager.

"(2) In these regulations, unless otherwise indicated, the titles 'company' and 'general manager' will be understood as meaning the Pennsylvania Co., and the general manager of that company.

"(3) The object of this department is the establishment and management of a fund to be known as the 'Relief Fund,' for the payment of definite amounts to employees contributing to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employees.

"(4) The relief fund, from which the proposed benefits are to be paid, will be formed by voluntary contributions from employees; appropriations, when necessary to make up any deficit, by the several companies respectively, and income or profit derived from investments of the moneys of the fund, and such gifts or legacies as may be made for the use of the fund.

"(5) The associated companies under the stipulations of the agreement between themselves hereinbefore set forth, will take general charge of the department, guaranty the fulfillment of the obligations assumed by them respectively, in conformity with the regulations from time to time established, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof. The company will take charge of the funds and be responsible for their safe-keeping."

Section 6 provides for the selection of an advisory board; one member to be chosen by the contributing members of the six or more constituent companies composing the association, and three to be selected by the board of directors of the Pennsylvania Company, and three to be selected by the directors of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.

"(10) The moneys received for the relief fund shall be held by the company in trust for the relief department. The advisory committee shall, subject to the approval of the board of directors of the company, direct the investment, and any changes therein, of money which is not required to be kept on hand for current use. Such investments shall be in the name of the company, 'in trust for the relief department.' "

"(17) No employee will be required to become a member of the relief fund."

The other important facts necessary to an understanding of the case are stated in the opinion.

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J. M. Sheets, Atty. Gen., J. E. Todd, Asst. Atty. Gen., and Smith W. Bennett, for plaintiff in error.

Chas. E. Burr and T. M. Livesay, for defendant in error.

PRICE, J. (after stating the facts). We assume that the relator commenced the action in the circuit court against the defendant railway company under favor of section 6761, Rev. St., which is: "A like action [quo warranto] may be brought against a corporation: (1) When it has offended against a provision of an act for its creation or renewal, or an act altering or amending such acts. (2) When it has forfeited its privileges and franchises by non-user. (3) When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises. (4) When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in the contravention of law." Inasmuch as neither the voluntary relief department, so called in the statement of the case, or its members, are parties to the suit, it would seem that the right to the remedy is not under clause 3 of section 6760, but under clause 4 of section 6761, just quoted. And the prayer of the petition is "that the defendant be ousted from further continuing said business of insurance by means of its said relief department, or in any other manner whatever, and asks such other relief as the nature of the case may require." So it is the complaint against the railway company that, under its charter and franchise as a railway company, it is conducting an insurance business in contravention of law, from which it should be ousted. The answer denies that the defendant company transacts an insurance business, and in the circuit court certain facts were agreed upon in the trial and submission of the issue, some of which appear in the statement of the case. But there are some additional facts contained in the agreement which are necessary to be noticed in the determination of the important controversy, for it is not contended that the defendant openly and in the usual manner conducts insurance, and holds itself out to the public as an insurance company, and clearly such is not the fact in the case before us.

It is claimed by the relator, however, that the business done under the name of the "Voluntary Relief Department," and in the manner and by the means employed, amounts, in substance, to an insurance business, and which exceeds the charter powers of the company. A proper determination of this question necessarily requires of us something more than a casual examination of the plans, structure, and operation of the machinery by which the business in question is advanced and carried forward.

It, no doubt, is true that the organization of the so-called relief department was in the first instance projected by the defendant and other railway companies under the control and

management of the Pennsylvania Company, and perhaps the plan may have emanated from the latter company; but this is not important in this case, for the record discloses that the defendant, having a relief department, such as is now under criticism, in November, 1890, by written contract with a number of other railway companies who had leased their respective lines to the Pennsylvania Company, associated themselves in the administration of their respective relief departments, and they are denominated the "Pennsylvania Lines West of Pittsburgh." They adopted certain regulations, and it is recited that one of the objects of the association is to "secure uniformity and economy;" that to accomplish this they "associated themselves" for the purpose of a joint administration and regulation of said respective relief departments under one common organization, to be known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." It further appears that prior to November, 1890, the Pennsylvania Company and the defendant company had "each respectively established a relief department for the benefit of its service and employees," and any other companies owning lines west of Pittsburgh which were being operated by the Pennsylvania Company, and which had adopted or would adopt similar relief departments, might associate with the former companies for the joint administration of the relief departments.

This brief history explains the character and form of the application of membership which is found in the record, and may give some color to the other features of the case. But the defendant, as did each of the other companies so associated, no doubt, continued its own separate relief department, with a subordinate or separate advisory board, partly composed of men selected by the contributing members, and partly of men selected by the boards of directors of the constituent companies.

With this understanding of the general outlines of the origin, purpose, and character of the relief department connected with the defendant, is it guilty of conducting an insurance business in contravention of law? This question suggests another: What is insurance business? Various definitions have been given in brief of counsel, but we are content with the summary given in Bouvier's Law Dictionary (Rawle's Revision) 1068: "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils." In another form, on the same page, it is said: "An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed." Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify

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another against injuries by accident or death from any cause not excepted in the contract. In the parlance of the business of insurance, ordinarily the contract is called a "policy"; the consideration paid, the "premium"; and the events insured against are called "risks and perils." In case of injury or destruction of the property insured, or injury by accident, or liability for death, the liability is called a "loss." Policies of this character may be preceded by an application for the same. In the relief department practice under review, and application is made the basis for membership, and the applicant must be an employee of the company to which the department is attached. It is required to be addressed as follows: "Pennsylvania Lines West of Pittsburgh, Voluntary Relief Department. Application for Membership in the Relief Fund. To the Superintendent of the Relief Department." The applicant then states his name and residence, and the name of the company with which he is employed, the nature of the service engaged in, and that he has knowledge of, and will be bound by, the regulations of the relief department; and he constitutes the proper agent of the railway company his agent to apply, as a "voluntary contribution" to the relief fund, from his wages, according to the rate of wages earned, as graded in the regulations, for the purpose of securing the benefits provided for in the regulations for a member of the "relief fund" and "additional death benefit"; stating his class, and name of the beneficiary in case of death. The application contains the following stipulation, which will be discussed later in the opinion: "And I agree that the acceptance of benefits from the relief fund for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance." There are other statements in the application not material to our inquiry, and a certificate is issued in pursuance of the terms of such application, if it be approved.

Section 31 of the regulations provides that "the word 'contribution' wherever used in the regulations, or in the organization adopted in connection therewith, shall be held and construed to refer to such designated portion of the wages payable to an employee as he agrees to receive in the form of a right to benefits, in and through the relief fund; and the words 'contributors,' 'contributing employees'—and like words and phrases—are descriptive of employees so agreeing." It is stated in the third regulation, that "the object of this department is the establishment and management of a fund to be known as the 'relief fund,' for the payment of definite amounts to employees contributing to the fund * * * when they are disabled by accident or sickness, and, in the event of their death, to the relatives or other beneficiaries

specified in the application of such employees." And by regulation 4 it is said that this fund is formed by voluntary contributions from employees, appropriations by the railroad company when necessary to make up a deficit, etc. In regulation 10 it is provided that "the money received from the 'relief fund' shall be held by the company in trust for the relief department." Investments made of the fund, if any, shall be in the name of the company "in trust for the relief department."

The railway company is the depository of the fund so raised, and is responsible for its management and safe-keeping, and agrees to make good any deficit in the fund which becomes necessary to meet the proper demands on the relief department. This management is by the general manager of the company and the advisory board, the latter being composed of persons mutually selected by members of the fund and the companies. Moreover, the railway company defrays all the expenses of the management, and the emergency services of the surgeons are rendered free by the company surgeons. Not a dollar of the fund ever belongs to the railway company, and it primarily is made up of a certain part of the wages of the employee, retained for that purpose by his direction. The concern has no capital stock. The doors to membership in this fund are not open to the general public. While an employee is not required to become a member, none but employees can do so. While it is true that the railroad company is the depository of the fund, and stands good for its safe-keeping and proper disbursement, it is, after all, but the custodian of a certain portion of wages which the employee directs shall be retained to produce the benefit fund, from which he may draw in times of sickness or other disablement.

Is this an insurance business? It is not held out to be such. The objects stated in the organization and regulations are clearly otherwise. Neither the railway company, nor its relief department, advertises for or in any other way solicits patronage. The members of the fund are volunteers. The business transacted, while in part done by an officer of the company, aided by representatives of the members, is not mingled with the business and accounts of the railway company. It has no offices set apart for an insurance business, and has no agents to promote its interests. It does not undertake to insure or indemnify against either sickness, accident, or death. Such is not the language or spirit of the relation between the member and the fund. On the contrary, in case of sickness or injury the members may draw from the relief fund what they mutually have created from a portion of their wages retained for that purpose, and the payment of the benefit is not the payment of a loss on a risk named in a policy or other instrument of insurance. This differs from an insurance business as commonly, and we might say univer-

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sally, conducted. It is organized on an insurance basis—advertised as such. It needs and uses agents to represent it, and it solicits from the general public. It has offices and current expenses, etc.; and, to protect the public, insurance laws have been enacted, requiring publicity of its resources and methods of business, and in most cases periodical sworn statements of the condition and extent of the business being transacted. All this to prevent imposition upon the public, which might be misled by the representations of agents, or by published inducements for patronage. Another marked distinction between the relief department and insurance business is that there is no profit to the railway company, and no profit, in the business or commercial sense, to the members of the fund, except such increase of the fund as may arise by way of interest on its investment in case of a surplus. Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability, and capital invested, and it would be a strange insurance business that would omit this great incentive from its plans and purposes.

But it is said there is a resulting benefit to the railway company from the maintenance of the relief department, in the nature of profit, and that it consists in the stipulation in the application for membership that the acceptance of benefits under the certificate of membership releases the company from all liability to him or his beneficiary for damages on account of injury or death. We have hereinbefore quoted that stipulation, but it must be observed that the member or beneficiary, after the injury, and all its facts and circumstances are fully known, has the right to elect as between the acceptance of benefits and a claim against the company for damages. He is not compelled to accept benefits or nothing, and he waives no right to proceed against the company until he has accepted the benefits provided for him. It is true that very many may accept the benefits and release the company, but it is not every injury to the employee, and not every case of his death from injury in the service, that furnishes a good cause of action against the company. Whatever benefit may accrue to the company by the acceptance of benefits cannot be called profit, because it is but a remote or probable sequence to the membership of the employee. Indeed, it seems that the liability of the railway company is enlarged by the relief department. It vouches for the payment of benefits, if accepted, and independent of any right of action against it, and leaves open the option to accept benefits, or decline them and claim damages of the railway company.

If it is said that the company expects to realize from the relief department by reason of more loyal service and increased confidence of the employee in his employer, we may reply that loyalty of service and reasonable confidence are due the employer so long as he faithfully and honorably performs his contract and discharges all his duties to his employee. It

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seems difficult to figure out of the relation that exists after and on account of this membership the idea of profit to the company. If it breeds good will and contentment, the same is laudable, and we see nothing in the rules of the department that takes away or jeopardizes a single legal right of the employee. If sick, he may receive the aid. If injured in the service, even through his own negligence, or in a service the risks and perils of which he assumed, he is entitled to his share of the fund. And if his injury is the fault of the company, he can elect to take the benefits provided or sue at law.

In one form or another, the controversy we are dealing with has been before other courts of final resort, and the almost if not altogether unanimous holding is that managing and conducting such a relief department is not insurance business, but, on the contrary, a beneficial provision, merely, for employees, which the railway company might aid in promoting. We will note but a few of such cases:

Commonwealth v. Equitable Beneficial Ass'n, 137 Pa. 412, 18 Atl. 1112, is a case where there was a proceeding in quo warranto to require the defendant to show by what authority it claimed the right to make contracts to insurance and issue policies of insurance. The defendant answered the writ, and denied making contracts of insurance or issuing policies of insurance as alleged by the Attorney General. In the syllabus the Supreme Court of Pennsylvania say:

"(1) A contract of insurance is purely a business adventure, not founded on any philanthropic or charitable privilege; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity, or security against loss, for a stipulated consideration.

"(2) But the design of what are known as 'benevolent societies,' which are purely of a philanthropic or benevolent character, is not to indemnify or secure against loss, but from the contributions of members to accumulate a fund to be used in their own aid or relief in the misfortunes of sickness, injury, or death."

At the risk of being prolix, we are tempted to adopt here a paragraph from the opinion of Justice Clark, on page 419 of that case (137 Pa., page 1113, 18 Atl.):

"To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance. What is known as a 'beneficial association,' however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or secure against loss. Its design is to accumulate a fund from the contributions of its members * * * to be used in their own aid and relief in the misfortunes of sickness, injury, or death. * * * The motives of

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the members may be, to some extent, selfish, but the principle upon which they rest is founded in the considerations intended. Their benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members have themselves contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death. Such societies have no capital stock. They yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance, or of indemnity, or of security against loss."

The above case was quoted from with approval in *Northwestern Masonic Aid Ass'n of Chicago v. Jones et al.*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

More directly in point is *Beck v. The Pennsylvania R. Co.*, 63 N. J. Law, 232, 43 Atl. 908, 15 Am. & Eng. R. Cas., N. S., 851, 76 Am. St. Rep. 211. The facts in that case show that it involved a relief department, organized precisely like the one under consideration. The opinion was by a unanimous court, and it held that the transaction was not an insurance contract within the meaning of insurance law. It also held that it was neither ultra vires, nor against public policy. On page 241 of the opinion (63 N. J. Law, page 911, 43 Atl., 76 Am. St. Rep. 211), Magie, C. J., speaking of the relief department, says: "It is limited to such of the employees of the company as voluntarily apply for admission to the fund and are admitted. They agree with each other and the company to contribute a portion of their wages to create a fund out of which they shall be paid certain sums in case of sickness or injury, and out of which, in case of death, certain sums shall be paid to the beneficiaries or next of kin. The sum so paid may save from want, but does not increase the estate of the employee. * * * I can perceive no reason why the establishment of such a fund, and the agreement of those who contribute to it as to its distribution, can be held to fall within the regulations of the insurance laws. Such association creates its own fund by voluntary action, and distributes it by an agreed upon plan, and the contract between them is not of insurance, but of beneficial relief. As they have neither sought nor obtained corporate powers for their purpose, they are not amenable to prohibitions against the use of corporate powers for that purpose, if any such exists. * * *"

The question was also before the Supreme Court of Iowa in two different cases. In *Donald v. C., B. & Q. Ry. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492, the character of a similar relief department was under review. One proposition of the syllabus is: "An association organized by a railroad company for its employees, which agrees to pay stated sums to members or their beneficiaries in case member is killed or injured in the employment—the company paying operating

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expenses and making good deficiencies after assessment—is not an insurance company, but a beneficiary society.” It was also decided in that case that the contract involved was not against public policy, and the reasons for the conclusion, we think, are unassailable.

Again, in *Maine v. The C., B. & Q. R. Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315, 9 Am. & Eng. R. Cas., N. S., 299, the same holding was made. It is there decided, also, that a railroad company has implied power to make such contract.

The foregoing cases cite many others to support them, but we have no further room for their consideration. The cases form a uniform current of judicial opinion. We have not been cited to a single case holding a contrary view, and our research has not been rewarded with one. We think the tide of judicial opinion is irresistible.

There is another reflection in this case. We have, to a reasonable extent, examined our statutes upon the subject of insurance and insurance companies. They provide carefully for their charter and organization, and for the deposit of the required amount of money or securities before proceeding to business. Certain sworn statements and annual reports are to be filed with the Insurance Department, etc. But we find no section that makes a call upon such an association as this relief department. The Legislature thus far has not recognized its business as that of insurance. On the contrary, there seems to be an express exception in favor of such associations. Section 3631a, Rev. St., provides: “This act [viz., sections 3630a to 3631] shall not apply to any association of religious or secret societies, or to any class of mechanics, express, telegraph or railroad employees, or ex-Union soldiers, formed for the mutual benefit of the members thereof, and their families, or blood relatives, exclusively, or for purely charitable purposes”—and then provides how such associations may incorporate. See, also, section 3631-23, Rev. St., where there is an exception of similar associations from the operation of insurance laws. We think it apparent from these and other sections that it has been the legislative intent to permit some of the plain and useful things of everyday life to be attended to without the wearing of a corporate charter.

It is also urged in argument for the relator that the acts of the railroad company in promoting and managing the relief department are ultra vires, and therefore the defendant should be ousted from performing them. Some of the cases we have cited deny this proposition, and there are many others of the same tenor and import. For the purposes of this branch of the case, we need seek no further than a decision of this court in *Gas & Fuel Co. v. Dairy Co.*, 60 Ohio St. 96, 53 N. E. 711. The first section of the syllabus expressed the opinion of the entire court, and it declares: “The implied powers which a corporation has in order to carry into effect those expressly granted, and accomplish the purpose of its

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creation, are not limited to such as are indispensable for these purposes, but comprise all that are necessary, in the sense of appropriate, convenient, and suitable, including the right of reasonable choice of means to be employed." The second section of the syllabus lacked the support of but one member of the court, and it declares: "Acts of a corporation, which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires when they are incidental to, or form part of, an entire transaction, that in its general scope is within the corporate purpose. The validity of such a transaction is to be determined for its general character, considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others."

The most of the work of an employee of a railroad company is hazardous, and frequent injuries are sustained, requiring surgical and medical attention. The company has its surgeons along its lines to respond in case of injury, and, the more efficient the organization of this beneficent branch of the service, the better for both the master and servant. And yet the company should not be charged with conducting a medical or surgical school. If it should establish hospitals for its injured employees, and equip them with everything conducing to comfort and speedy recovery, including surgical attention, its acts should not be regarded as ultra vires, in that it conducts hospitals. It may, for the purposes of careful and successful management of its business as a railroad, establish telegraph and telephone facilities, and install a proper number of competent operators, and yet it may not be charged with carrying on a telegraph and telephone business. It may establish hotels and eating rooms along its lines, and not be in the hotel business. All these things are incidental to the main occupation, and are within the implied powers conferred.

Again, it is said that the scheme adopted and the conditions of membership meet the condemnation of public policy. Some of the cases already cited consider this question also. There are very many others, a few of which we cite: *Otis v. Pennsylvania Co.* (C. C.) 71 Fed. 136; *P., C., C. & St. L. Ry. Co. v. Moore*, Adm'r, 152 Ind. 345, 53 N. E. 290, 14 Am. & Eng. R. Cas., N. S., 678, 44 L. R. A. 638; *Johnson v. Philadelphia & Reading R. Co.*, 163 Pa. 127, 29 Atl. 854; *Beck v. Pennsylvania Co.*, supra; *Hamilton v. St. L., K. & N. W. R. Co.* (C. C.) 118 Fed. 92. These cases cite many others to the same effect, and, as on the first branch of this case, the authorities present a solid front. We need not pursue this discussion further than to cite a leading case decided by this court: *P., C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 7 Am. & Eng. R. Cas., N. S., 152, 35 L. R. A. 507. That case involved the same relief department developed in the present inquiry, and the certificate of membership is

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precisely like the form now in use by the defendant, and this court held expressly that the contract between the members and the company is not contrary to public policy. We are still satisfied with that decision, and believe it to be entirely sound.

The grounds for ousting the defendant have not been sustained. The circuit court correctly so held, and its judgment is affirmed.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err., *v.*

ABNER TOWNSEND *et al.*

(Submitted January 30, 1903. Decided May 4, 1903.)

[23 Sup. Ct. Rep. 671.]

Adverse Possession—Of Railroad Right of Way.*

Adverse ownership for private use under a state statute of limitations can confer no title on an individual to a portion of the right of way granted by the act of Congress of July 2, 1864, § 2 (13 Stat. at L. 365, chap. 217), to the Northern Pacific Railroad Company for the construction of its road.

In Error to the Supreme Court of the State of Minnesota to review a judgment which reversed a judgment of the trial court in favor of the Northern Pacific Railroad Company in an action of ejectment brought by it to recover possession of a portion of its right of way. Reversed.

See same case below, 84 Minn. 152, 86 N. W. 1007.

Statement by MR. JUSTICE WHITE:

This controversy concerns the validity of an asserted title, by adverse possession, to a portion of the right of way in Wadena county, Minnesota, granted to the Northern Pacific Railroad Company, its successors and assigns, by the 2d section of the act of Congress approved July 2, 1864. 13 Stat. at L. 365, chap. 217. The plaintiff in error, the Northern Pacific Railway Company, a corporation of the state of Wisconsin, acquired the railroad and property of the former named company on or about August 31, 1896, by purchase at a sale under foreclosure of certain mortgages.

*As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see foot-note appended to *St. Joseph, etc., Ry. Co. v. Smith* (Mo.), 5 R. R. R. 562, 28 Am. & Eng. R. Cas., N. S., 562; *Northern Pac. Ry. Co. v. Hasse* (Wash.), 4 R. R. R. 283, 27 Am. & Eng. R. Cas., N. S., 283 (right of homesteader); *McLucas v. St. Joseph & G. I. R. Co.* (Neb.), 7 R. R. R. 342, 30 Am. & Eng. R. Cas., N. S., 342 (interests of public considered).

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By the 1st section of the act of 1864 the Northern Pacific Railroad Company was created a corporation, and was empowered to construct and maintain a continuous railroad and telegraph line from a point on Lake Superior to some point on Puget sound. In the 2d section of the act it was provided, among other things, as follows:

“And be it further enacted, That the right of way through the public lands be and the same is hereby granted to said ‘Northern Pacific Railroad Company,’ its successors and assigns, for the construction of a railroad and telegraph, as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States.

Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was to be supervised by commissioners appointed by the President. Sec. 4. Section 5 provided how the road must be built, and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by § 7. In § 8 conditions of the grant in respect to the commencement and completion of the construction of the road were enumerated. Section 9 reserved the right to Congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service, and subject to such regulations as Congress might impose respecting charges for government transportation. The remaining provisions of the act dealt with the mode of acceptance of the grant, the powers and duties of the board of directors and other officers of the company, the payments of cash assessments, and other subjects. We need only further particularly refer, however, to § 18, wherein it was provided that the railroad company, previous to commencing the construction of its road, should obtain the consent of the legislature of any state through which any portion of its line might pass. Such consent was duly given by the state of Minnesota.

The company signified its acceptance in writing, as provided in the act. In November, 1871, the line of road was definitely located, and a duly approved map was filed showing said definite location. This line crossed the northwest quarter of section 24, township 134 north, of range 35 west, of

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the fifth principal meridian, Minnesota. At that time, as well as prior thereto, said quarter section was public land, to which the United States had full title, and the same was not reserved or otherwise appropriated, nor had any entries or filings or applications to make entry or filing thereon been made. During the years 1870 and 1871 the railroad was duly constructed through the section referred to, and the portion of the road thus constructed was thereafter duly accepted by the President.

In December, 1878, and February, 1882, homestead entries were initiated on said northwest quarter of section 24, and on November 30, 1885, and July 24, 1889, patents, which purported to convey the whole of each 40-acre subdivision, were issued to Abner Townsend and George H. Brown, respectively. Subsequently, in 1886 and 1888, the title to the said northwest quarter was conveyed to the defendant in error Minerva Townsend. During the occupancy of the homesteaders, they cultivated up to the line of the ordinary and snow fences of the railroad, situated respectively 50 and 100 feet from the center of the track, and such occupancy continued a sufficient length of time to constitute a title by adverse possession under the limitation statutes of Minnesota. Demand was made by the railroad company for possession of that portion of the quarter section which was within the granted right of way, and, upon non-compliance, an action of ejectment was brought in a court of the state of Minnesota to recover possession of the disputed ground. The case was tried by the court without a jury. Lengthy findings of fact were made, and, as a conclusion of law, the court found that the railroad company was entitled to the possession of the premises described, and entered judgment accordingly.

On appeal the supreme court of Minnesota reversed the judgment of the trial court. 84 Minn. 152, 86 N. W. 1007. The cause was then brought to this court.

Messrs. C. W. Bunn and James B. Kerr for plaintiff in error.

Messrs. Harold Preston, A. G. Broker, and F. T. Post for defendants in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of

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way because of the fact that the grant to them was of the full legal subdivisions.

Conceding the adverse possession and its efficacy under the state law as against the railroad right of way to be as found by the state court, the sole question which arises, then, for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question.

In determining whether an individual, for private purposes, may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guarded by the doctrine enunciated in *Packer v. Bird*, 137 U. S. 661, 669, 34 L. Ed. 819, 821, 11 Sup. Ct. Rep. 210, and approvingly referred to in *Shively v. Bowlby*, 152 U. S. 1, 44, 38 L. Ed. 331, 347, 14 Sup. Ct. Rep. 548, 564, viz.: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (*New Mexico v. United States Trust Co.*, 172 U. S. 171, 181, 43 L. Ed. 407, 410, 19 Sup. Ct. Rep. 128; *St. Joseph & Denver C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, 2 Am. & Eng. R. Cas. 510, 5 Am. & Eng. R. Cas. 408), it must be held that the fee passed by the grant made in § 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin Case*) "to those necessarily implied, such as that the road shall be . . . used for the purposes designated." Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which

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it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 468, 23 L. Ed. 356, 361, "a railroad company . . . is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern P. R. Co. v. Smith*, 171 U. S. 261, 275, 43 L. Ed. 158, 163, 18 Sup. Ct. Rep. 794, 799, speaking of the very grant under consideration: "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.

As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to

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review the cases which have been called to our attention supporting, on the one hand, or denying, on the other, the broad contention that title by adverse possession, under state statutes of limitation, may be acquired by individuals to land within the right of way of a railroad. None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case. As here we find that the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress, the cases in question are inapposite.

The judgment of the Supreme Court of Minnesota must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion. And it is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissent.

NASHVILLE, C. & ST. L. RY. CO. v. STATE.

(*Supreme Court of Alabama, May 21, 1903.*)

[34 So. Rep. 401.]

Location of Stations—Powers of Commissions.*

In the absence of statutory authority, the railroad commission may not order a railroad company where to locate a station and what depots to build.

Same—Same—Statutes.

Code 1896, § 3451, enumerates certain things which railroad companies must do or furnish at stations for accommodation of passengers, when required by the railroad commissioners. Section 3452 provides for the manner of serving notice of the order of the railroad commission requiring the performance of any of the duties enumerated in section 3451: *held*, that section 3453, providing for enforcement, by proceedings in chancery, of the orders of the commission, refers solely to the duties and powers enumerated in the preceding sections, which do not relate to changing stations or erecting depot buildings for freight.

Same—Same—Authority.

Code 1896, § 3490, giving the railroad commissioners general supervision over railroads, and providing that they shall keep themselves informed in regard to their condition and manner of operation, and shall recommend to the railroad companies the adoption of such measures and regulations as the commissioners deem conducive to public

*As to what are the powers of railroad commissioners, see general note, 8 Am. & Eng. R. Cas., N. S., 614; *Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co.* (Kan.), 7 R. R. R. 509, 30 Am. & Eng. R. Cas., N. S., 509; *Morgan's Louisiana & T. R. & S. S. Co. v. R. Commission of Louisiana* (La.), 6 R. R. R. 122, 29 Am. & Eng. R. Cas., N. S., 122.

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safety and interest ; and section 3494, authorizing notice to the railroad company of what the commissioners deem necessary changes, of which the commissioners are required to report in their annual report to the Governor—give no more than advisory functions, without any power to compel obedience.

Appeal from Chancery Court, Marshall County; Wm. H. Simpson, Chancellor.

Suit by the state of Alabama against the Nashville, Chattanooga & St. Louis Railway Company. From a decree overruling demurrers to the bill, defendant appeals. Reversed.

Oscar R. Hundley, for appellant.

Chas. G. Brown, Atty. Gen., and Robt. N. Bell, for the State.

DOWDELL, J. The bill in this case is filed in the name of the state of Alabama against the Nashville, Chattanooga & St. Louis Railway Company, under section 3453 of the Code of 1896. Its purpose is to compel a compliance by the appellant railway company with an order of the railroad commissioners of the state directing and requiring said railway company to locate a station and erect a depot building for the accommodation of passengers and for the handling of freight for shipment in the town of Guntersville, Marshall county, Ala., through the corporate limits of which it is averred that said railway company operates its railroad. It is also shown by the bill that Guntersville has a population of 584 inhabitants, and is the county site of Marshall county, and that the present station and depot is located just without the corporate limits of said town, and in the town of Wyeth City, which is adjacent to Guntersville, containing a population of about 299 inhabitants, and that said depot, as at present maintained, is a joint depot for the two towns. There are other allegations as to the amount of passenger and freight traffic from the town of Guntersville annually done by the railroad. The order sought to be enforced, and which was made by the railroad commissioners in a proceeding before that body instituted by J. L. Burke, mayor, and others, was as follows: "The premises considered, it is therefore ordered that the Nashville, Chattanooga & St. Louis Railway Company change the location of the depot for the town of Guntersville from its present site in the town of Wyeth City, and that said depot for Guntersville be placed on the plat of ground lying on the west side of said railroad and St. Clair street and southwest of Taylor street in Guntersville, Ala., being the plat of ground proposed to be donated to said railroad by Robert N. Bell and T. L. Farrow. It is further ordered and directed that said depot shall be twenty-five feet wide and one hundred feet long, with sufficient sitting or waiting room for the comfort and accommodation of its passengers, with separate waiting rooms for the two races, and that a storage room for the reception and shipment of freight shall be maintained of sufficient size to do the business of said town. It is further ordered that said depot shall at all times be suitably

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heated in the cold weather, and supplied with sufficient fresh drinking water when passengers waiting for trains are present, and with sufficient and comfortable chairs or seats; and that said depot and platform shall be sufficiently lighted, when necessary for the comfort and accommodation of passengers, and connected therewith a sufficient number of privies or water-closets, to be at all times kept clean," etc. The prayer of the bill is as follows: "Your orator prays that by decree of this court the said defendant be required, directed, and compelled to change the location of the depot for the town of Guntersville from its present site in the town of Wyeth City, and place the same on the plat of ground lying on the west side of said railroad and St. Clair street and southwest of Taylor street in Guntersville, Alabama, being the plat of ground proposed to be donated as aforesaid to said defendant by Robert N. Bell and T. L. Farrow, and to fully comply with said order made by said railroad commission, which said order is set forth in section 3 of this bill." Following the special prayer is a general prayer for relief.

The demurrer to the bill raises the question of the jurisdiction and power of the court to entertain the bill and grant the relief sought. There is no pretense of authority for the filing of the bill under any provision in the charter of the defendant company. We must, therefore, look to the statutes alone for authority to the railroad commission to make the order and for jurisdiction in the court to entertain the bill for its enforcement, since there is no common-law principle upon which such jurisdiction in the court can be rested. While the corporation is quasi public in its character, and owes duties to the citizens which the courts can and will, under appropriate remedies, compel it to respect, yet the location of stations and the building of depots are not within such duties when not imposed by legislation. This principle is recognized by the lawmaking power of this state in the enactment of statutes regulating and controlling railroad corporations, and in the creation of a railroad commission. Independent of legislative control, in so far as any duty of the corporation arises, in the location of stations, to consider the interest and convenience of the general public, it is one that rests in the discretion of its board of directors or other governing board, and in the exercise of which, while not injuring the citizen by its abuse, the right of considering the interest of the stockholder can not be denied. In *Page v. L. & N. R. R. Co.*, 129 Ala. 237, 29 South. 676, 21 Am. & Eng. R. Cas., N. S., 1, where it was urged in argument that a common-law duty rested on the railroad company to establish and maintain comfortable waiting rooms at its stations, it was said: "An examination of the cases bearing on this question discloses that no such duty exists, unless imposed by the charter of the defendant, or by a statutory regulation, or by some other legislative authorization conferring the powers upon a railroad com-

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mission to impose the duty;" citing *People v. N. Y., L. E. & W. R. R.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, 29 Am. & Eng. R. Cas. 480; *Railroad Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092. This latter case is quite similar to the case at bar, and especially so with reference to the application of common-law principles. In that case the subject was discussed at length, and a number of authorities cited. The case of the *State v. Republican Valley Railroad*, 17 Neb. 647, 24 N. W. 329, 22 Am. & Eng. R. Cas. 500, 52 Am. Rep. 424, here relied on by the appellee, was also cited and criticised as being inconsistent with the doctrine laid down in *Atchison, etc., R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, 681, 682, 4 Sup. Ct. 185, 28 L. Ed. 291, and in *People v. New York, L. E. & W. R. R.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. Also the case of *Railroad Commissioners v. Portland & Oxford R. R. Co. (Me.)* 18 Am. Rep. 208, cited by appellee, is referred to and commented upon. But in that case the statutes expressly empowered the railroad commission to make the order, and to apply to the court to enforce it. It is hardly to be questioned but that it is entirely within legislative competency to empower the railroad commission to order the location of stations and the building of depots and to apply to the courts for the enforcement of the order. *Page v. L. & N. R. R. Co.*, supra; 23 Amer. & Eng. Encyc. of Law (1st Ed.) 118, and notes 1 and 2.

By an act approved February 15, 1897 (see margin page 974 of the Code 1896), any person, company, or corporation owning or operating any railroad through the corporate limits of any incorporated town or city of more than 1,000 inhabitants, is required to establish and maintain one or more depots within such corporate limits sufficient for the accommodation of passengers and the storage of freight. While nothing is claimed in the present case under this statute, the town of Guntersville, being a town of less than 1,000 population, the enactment of the statute is a legislative recognition that independent of legislation no duty to establish and maintain depots existed.

Looking to our general statutes bearing upon the subject, we find under chapter 95, p. 974 of the Code of 1896, art. 2, the caption of which is, "Regulation affecting the convenience of passengers." Section 3451, which provides that every railroad company, for the comfort and accommodation of its passengers, must have when required by the railroad commissioners, at each of the passenger stations along the line of railroad operated by such company, sufficient sitting or waiting rooms, to be determined by the commissioners, for passengers waiting for trains, having regard to sex and race, which shall be suitably heated in cold weather, and supplied with sufficient fresh drinking water, when passengers waiting for trains are present, and with sufficient and com-

fortable chairs or seats; and connected therewith a sufficient number of comfortable privies or water-closets, to be at all times kept clean; and, in a conspicuous place at such station, a bulletin board showing the schedule time of the arrival and departure of all passenger trains; and, if there is a telegraph station thereat, when any passenger-train is delayed, a bulletin posted in a conspicuous place at such station, showing how much the train is behind its schedule time, and continue to post such bulletins each hour until the train arrives. Section 3452 provides for the manner, etc., of serving notice of the order of the railroad commission requiring the performance of any of the duties enumerated in section 3451, and the time within which such duties must be performed after the service of notice. Section 3453 provides for the enforcement of the orders of the railroad commission upon failure or refusal of the railroad company to comply with the same within a specified time by appropriate proceedings in the chancery court. We think it quite clear that the provisions of section 3453 for proceedings in the chancery court have reference solely to the duties and powers imposed and conferred by sections 3451 and 3452. It is manifest from the reading of section 3451, that no duty is imposed by the provisions of this section on the railroad company to change its stations, or to erect and maintain depot buildings for the storage of freight, nor is there any authority or power conferred on the railroad commission to require the same to be done, either expressly or by implication. The statute is explicit in the enumeration of the duties required of the railroad company, and what is sought to be compelled in the present proceeding is not embraced in the enumerated duties.

It is insisted, however, that the railroad commission had the power, under section 3490, to make the order in question. This section gives the commissioners general supervision over all the railroads in the state, and directs that they "shall from time to time, as they may deem necessary, examine the same, and keep themselves informed as to their condition and the manner in which they are operated with reference to the security and accommodation of the public, and their compliance with their charters and the laws of the state; and shall, in writing, recommend to the persons or corporations operating such railroads, or any of them, from time to time, the adoption of such measures and regulations as the commissioners may deem conducive to the public safety and interests; and the commissioners, in the performance of their duties, shall have the right to pass free of charge on all the railroads in the state, and take with them any person in their official employment." We are unable to discover in this section, under the authority of the general supervision conferred, anything more than advisory functions, without any power to compel. And this conclusion is fortified and ren-

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dered clearer as to such being the legislative intent when this section is construed in connection with sections 3451, 3452, and 3453, where the authority is given the commissioners to order the things enumerated to be done, and remedies are provided for the enforcement of such order. Section 3494 is subject to a like construction. A careful reading of this section fails to disclose anything more than an authority to notify the railroad company of what the commissioners deem necessary changes, and of which the commissioners are required to "report" in their annual report to the Governor. The authority to notify falls far short of the power to order and compel. Our conclusion is that the chancellor erred in overruling the demurrer to the bill, and his decree will be reversed, and one will be here entered sustaining the demurrer.

Reversed and rendered.

HARRINGTON *et al.* v. LOS ANGELES RY. CO.

(*Supreme Court of California, Oct. 8, 1903.*)

[74 Pac. Rep. 15.]

Accident on Street Railway Track—Contributory Negligence—Violation of Ordinance Limiting Speed of Bicycles.

Where deceased was killed in a collision with a street car while he was riding in a bicycle race as a part of a Fourth of July celebration, and at the time of his injury he was violating a city ordinance limiting the rate of speed of bicycles in the city, he was guilty of contributory negligence as a matter of law.

Same—Same—Negligence after Discovery of Plaintiff's Peril—Proximate Cause.

Evidence in an action for death of a bicycle rider by collision with street car considered, and *held* that the negligence of the motorman in failing to exercise reasonable care to avoid the collision after discovering decedent's peril, and not decedent's contributory negligence, was the proximate cause of the injury.

Same—Negligence after Discovery of Plaintiff's Peril—Last Clear Chance.*

Where the motorman had the last clear chance of avoiding the accident by the exercise of ordinary care, the street car company was liable for his failure to do so.

*As to the care required of those in charge of street cars to avoid collision with persons, animals, or vehicles, see *Kotila v. Houghton St. Ry. Co.* (Mich.), 8 R. R. R. 808, 31 Am. & Eng. R. Cas., N. S., 808, and foot-note; *Birmingham Ry. & Elec. Co. v. Jackson* (Ala.), 8 R. R. R. 810, 31 Am. & Eng. R. Cas., N. S., 810; *Mock v. Los Angeles Traction Co.* (Cal.), 8 R. R. R. 815, 31 Am. & Eng. R. Cas., N. S., 815.

As to the combined effect of contributory negligence and negligence after discovery of plaintiff's peril, see *Klockenbrink v. St. Louis & M. R. Co.* (Mo.), 7 R. R. R. 63, 30 Am. & Eng. R. Cas., N. S., 63; foot-note appended to *Barry v. Burlington Ry. & Light Co.* (Iowa), 6 R. R. R. 675, 29 Am. & Eng. R. Cas., N. S., 675; *Law v. Missouri, K. & T. Ry. Co. of Texas* (Tex.), 2 R. R. R. 582, 25 Am. & Eng. R. Cas., N. S., 582; *Edwards v. Chicago & A. Ry. Co.* (Mo.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333; *Humphreys v. Valley R. Co.* (Va.), 5 R. R.

Harrington v. Los Angeles Ry. Co**Same—Contributory Negligence—Question for Jury.**

The reasonableness of the rider's efforts to escape the injury after discovering the danger was a question for the jury.

Same—Concurring Negligence and Contributory Negligence—Insufficiency of Evidence.

Where a street railway motorman, with knowledge of the danger of injury to bicycle riders racing along a public street, willfully started to run his car across the street, and by the exercise of ordinary care, after discovering deceased's peril, could have stopped and prevented the accident, and it appeared that deceased on discovering the car attempted to avoid it, decedent's negligence did not continue to the moment of accident, so as to sustain a conclusion that both parties were contemporaneously and actively at fault at the time thereof.

Harmless Error.

Where, in an action for death of a bicycle rider caused by a collision with a street car, the motorman testified that he moved his car because he thought he had plenty of time, and that it was dangerous for him to stop the car at that time, the sustaining of an objection to a question as to whether the motorman would have moved the car at the time if he had supposed that he was thereby endangering the lives of deceased and other bicycle riders on the street was harmless.

Accident on Street Railway Track—Wanton Negligence—Instructions.

Where decedent's death was alleged to have been caused by the wanton negligence of a street railway motorman, an instruction that, though one might not have the actual intent to injure, still, if there is a reckless indifference or disregard of the probable consequences of doing or omitting to do an act, conscious from his knowledge of existing circumstances that his conduct will likely or probably result in injury, he is guilty of wanton negligence, was proper.

Contributory Negligence and Negligence after Discovery of Plaintiff's Peril.

In an action for death of a bicycle rider in collision with a street car, an instruction that where an injured party's negligence brings him into danger, and defendant discovers the danger in time to avoid the injury by the exercise of ordinary care and fails to do so, the defendant is liable if the injured party, after discovering his danger, exercises ordinary care to escape, was not objectionable, as relieving the injured person from the consequences of his failure to discover his own danger resulting from his own negligence.

Instructions.

Where defendant was not entitled to have an instruction given as requested, a modification thereof which, though it took away the whole effect of the requested instruction, did not add anything prejudicial to defendant's case, was not error.

Wanton Negligence—Instruction—Using Term "Reckless."

Where it was alleged that deceased came to his death through the wanton negligence of defendant's motorman, instructions using the word "reckless" as the equivalent of "wanton" were not objectionable, on the ground that such terms were not synonymous.

Instructions.

Where a requested instruction was erroneous in withdrawing from the jury a material issue, a modification thereof, by omitting the direction

R. 649, 28 Am. & Eng. R. Cas., N. S., 649; *Denver & R. G. R. Co. v. Buffehr* (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., 762; notes, 8 Am. & Eng. R. Cas., N. S., 677, 12 Am. & Eng. R. Cas., N. S., 332 (doctrine of *Tuff v. Warman*); *St. Louis & S. F. Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123; *Memphis & C. R. Co. v. Martin* (Ala.), 23 Am. & Eng. R. Cas., N. S., 683; *Baltimore & O. R. Co. v. Anderson* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 497; *Sloniker v. Great Northern Ry. Co.* (Minn.), 13 Am. & Eng. R. Cas., N. S., 819; *Merrieles v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158.

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that the verdict should be for defendant in case they found in conformity with the instruction, was not error.

Same.

If is not error to refuse portions of requested instructions covered by the charge given.

Contributory Negligence and Negligence after Discovery of Plaintiff's Peril—Comparative Negligence—Instruction.

Where deceased was killed in a collision with a street car alleged to have resulted from the willful negligence of the motorman after discovering decedent's peril, the modification of a requested instruction that if deceased, by ordinary care, might have discovered the approaching car, and he did not exercise such care, he was guilty of such negligence as would prevent a recovery by adding the words, as against any "ordinary negligence" of the defendant, was not erroneous, as injecting the doctrine of comparative negligence into the case, the words "ordinary negligence" being used to mean such negligence as might have existed in the absence of actual knowledge of the motorman of decedent's perilous position and a clear opportunity to avoid injuring him.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Fannie C. Harrington and others against the Los Angeles Railway Company. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Bicknell, Gibson & Trask, for appellant.

Hunsaker & Britt, for respondents.

ANGELLOTTI, J. This action was instituted by the plaintiffs, the widow and minor children of Arthur E. Harrington, deceased, for damages alleged to have been sustained by them by reason of the death of deceased, which death was alleged to have been caused by the negligence of defendant. A verdict was rendered in plaintiffs' favor for \$10,000, and from the judgment entered thereon and an order denying its motion for a new trial defendant has appealed.

It is earnestly contended that the evidence was insufficient to sustain the verdict. The claim in this regard is that, assuming that the defendant was negligent, still the evidence shows that the deceased was guilty of such contributory negligence as will preclude a recovery on the part of plaintiffs.

The deceased was at the time of the accident, July 4, 1900, participating in a long-distance handicap bicycle race, from Los Angeles to San Pedro or Santa Monica, a distance of about 20 miles. This race was described as "the usual Fourth of July race." The start was from the corner of Sixth and San Pedro streets, in the city of Los Angeles, and the course was southerly from Sixth street along San Pedro street, between the double tracks of defendant's street railway on said street as far as Washington street. On Ninth street, which intersects San Pedro street between Sixth and Washington streets, was a single-track railway of the defendant, crossing said double tracks on San Pedro street nearly at right angles. The participants in the race were numerous, probably more than 100, and they were started in groups, every 15 seconds, or less in

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some cases, for about 12 minutes. Several groups of riders had preceded the group of which deceased was a member, and which consisted of nine men. While the last four of these riders were approaching the Ninth street track, the other five having already crossed the same, one of defendant's Ninth street electric cars proceeding westerly along said street crossed San Pedro street in front of them. The riders were going at a high rate of speed, probably 20 miles an hour, although some of the witnesses put it a little lower and some higher. The car was proceeding 2½ to 4 miles an hour. The deceased, having discovered the approach of the car, left the group with which he was riding, and attempted either to pass in front of the car on the westerly side of San Pedro street, or to turn up Ninth street, and in so doing collided with the right-hand front corner of the car and was killed. The other three riders attempted to pass by the rear of the car. One of them testified that when about 15 or 20 feet from the car he threw himself sideways from his wheel to avoid striking the car, which he would otherwise have done, and, striking the ground, rolled clear to the car, against its side, and the other two riders fell over him. The railway tracks on San Pedro street were lined with people witnessing the race, such lines extending across Ninth street and the railway tracks of defendant thereon.

At the time of the accident there was an ordinance of the city of Los Angeles which prohibited any person from riding or propelling any bicycle within the corporate limits of the city at a rate of speed greater than eight miles per hour. The deceased was violating this ordinance, and was consequently guilty of negligence, without which, undoubtedly, the accident would not have occurred. If there had been no ordinance regulating the speed of bicyclists, it might well be contended that the evidence would have sustained a finding of the jury, that the deceased had not been guilty of contributory negligence—a finding that, under all the circumstances shown, the deceased was justified in assuming that the course between the railway tracks along San Pedro street would be kept sufficiently clear of obstructions to allow him to go at as high a rate of speed as he could; that he used all such precautions as a reasonable man under the same circumstances would use; that he discovered defendant's car as promptly as a reasonable man using such precautions would discover it; and that when he discovered the car he used reasonable care in attempting to avoid a collision therewith. But he was guilty of negligence in his violation of the provisions of the ordinance, and if it had not been for this negligence on his part the accident would not have occurred.

The complaint alleges that the defendant did, by its motor-man having charge of the operation of the car, "negligently, wantonly, and with wanton and reckless indifference to the safety of said Arthur E. Harrington, drive and propel said

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car against him, * * * who was then and there in full sight and view of said motorman," in consequence of all which said Harrington died. The claim of the plaintiffs in this connection is that, notwithstanding the negligence of the deceased, the motorman was aware of the perilous position in which the deceased had placed himself, and could, by the exercise of ordinary care, have avoided the accident, but failed to exercise such care to do so, and recklessly drove his car forward in the path of the racers, and that this negligence on his part was the proximate cause of the death of the deceased. It will thus be seen that plaintiffs invoked the rule enunciated in several opinions of this court to the effect that he who last has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring others must do so.

There was ample evidence to justify the jury in finding that defendant's motorman discovered the perilous position in which the deceased and his companions were placed at such a time and under such circumstances that he could, by the exercise of ordinary care, have avoided injuring them, and that he did not exercise such care. It needs no argument to demonstrate that bicycle racers traveling at the rate of 20 miles an hour or more along a narrow path, lined with spectators on both sides, and only 85 feet away (as the testimony of one disinterested witness indicated) from a place, on that path, towards which they were going, over which an electric car was about to cross, were already in a position of great peril, by reason of the approach of said car. Such circumstances would naturally convey to the mind of any reasonable man, having knowledge thereof, the question as to whether the riders, even though they immediately discovered the approach of the car, which was doubtful, would be able to get out of the way, and whether they must not inevitably cross the track along which the car was about to go, however much they might endeavor to avoid so doing, after discovering the car, in order to escape collision. There is no parallel between a case presenting such circumstances and the ordinary case where a person is discovered walking or riding towards a railroad track. Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on the track at such a time as to be injured thereby. But no such assumption could be held to be justified under the peculiar circumstances already stated.

There was evidence warranting the jury in finding that the motorman, who confessedly knew that the bicycle race was then in progress on San Pedro street, was warned by some of the numerous bystanders before he had reached the easterly line of San Pedro street that the racers were coming, some calling upon him to stop the car, and others exclaiming that

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the racers were coming; that some stood on the track in front of the car, endeavoring to stop the car by calling upon the motorman; he nevertheless proceeded, traveling at from two and one-half to four miles per hour, forcing the people in front to retire from the track; that he himself, after hearing the various warnings, saw the racers approaching under the circumstances already detailed, when he was still at least 20 or 25 feet east of the easterly line of the path along which they were proceeding; that after such discovery he could easily have stopped his car before it reached the path along which the bicyclists were proceeding, and thus have insured absolute safety to the riders, but that, on the contrary, he pushed his car forward, in reckless disregard of the dangerous position of deceased and his companions, knowing or having reasonable cause to believe that they must cross the track over which he was about to go. It is true that the evidence is conflicting on some material points, and that the motorman testified that he did not discover the approach of the riders until it was too late to stop, and that he then used all reasonable care to avoid injuring them. But the jury evidently did not believe this evidence to be true, and it was for them to determine the facts. There was also ample evidence to justify the jury in finding that immediately upon discovering his dangerous position the deceased exercised reasonable care in endeavoring to avoid injury. One of his fellow riders testified that the deceased exclaimed, "My God, look at that car!" And immediately switched off, and tried, as he supposed, to go around the front end of the car. The fatal result, and the escape from serious injury of the others, is in no way determinative of the question as to whether he used such reasonable care, for, as has been well said, "It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such *ex post facto* information." *Liverpool, etc., Ins. Co. v. S. P. Co.*, 125 Cal. 434, 439, 58 Pac. 55, 57. It must be remembered that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. The reasonableness of his effort to escape injury, after discovery of the danger, was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. We therefore have a case where the jury were warranted in finding the facts to be as follows, viz.: Deceased, by reason of his own negligence, was placed in a position of peril with relation to defendant's car. The defendant knew that the deceased was so placed, knew that it was at least doubtful whether the deceased could, by any act of his, remove himself from such peril, and knew that it could by the exercise of ordinary care, by simply stopping its

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car, absolutely remove the source of danger and avoid the injury. It failed to exercise such care, and recklessly pushed its car forward into the path over which the deceased was approaching, its motorman preferring to take the chance of getting over before deceased arrived at the crossing. The deceased, immediately upon discovering his dangerous position, used all reasonable care and made all practical effort to avoid the accident.

Upon this state of facts, established as the facts of this case by the verdict of the jury, the liability of the defendant follows as a matter of law, and the verdict is fully sustained by the evidence.

It would be difficult to find a case more clearly justifying the application of the rule so often approved by this court, to the effect that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter placed himself in such situation of danger by his own negligence. *Lee v. Market Street Ry. Co.*, 135 Cal. 293, 67 Pac. 765; *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Esrey v. S. P.*, 103 Cal. 541, 37 Pac. 500; *Cunningham v. L. A. Ry. Co.*, 115 Cal. 561, 47 Pac. 452; *Abrahams v. L. A. Traction Co.*, 124 Cal. 411, 57 Pac. 216; *Crowley v. City R. R. Co.*, 60 Cal. 628; *Meeks v. S. P. R. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67; *Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409. It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that defendant has been guilty of willful and wanton negligence. In either case, the liability would exist; for, where an act is done willfully and wantonly, contributory negligence upon the part of the injured person is no bar to a recovery. *Esrey v. S. P. Co.*, *supra*. As said by Mr. Beach in his work on Contributory Negligence: "When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not willful negligence." It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651. This, however, does not mean, as seems to be contended, that defendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a

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question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position. It was said in the prevailing opinion in *Everett v. L. A., etc., Ry. Co.*, 115 Cal. 105, 106, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, distinguishing that case from those where the principle under discussion is applicable: "The case is not like one where the injured party is discovered in time lying or standing upon a railroad track under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is even attempting, either on or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible. * * * Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way." See, also, *Meeks v. S. P. R. R. Co.*, 56 Cal. 513, 515, 38 Am. Rep. 67.

It cannot be held, in view of the evidence in the record and the finding of the jury, that the negligence of the deceased continued to the moment of the accident, and that both parties were contemporaneously and actively in fault at the time thereof; and what is said in several cases as to the inability of the injured party to recover under such conditions (see *Holmes v. S. P. Co.*, 97 Cal. 161, 31 Pac. 834; *Sego v. S. P. Co.*, 137 Cal. 405, 70 Pac. 279; *Everett v. L. A. Con. Elec. Ry. Co.*, 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350) is inapplicable here. The deceased did unquestionably discover his dangerous situation before the accident, and the verdict is a finding that he used all reasonable care and made all practicable effort to avoid the accident.

Defendant contends that there may have been a moment after the motorman discovered the approach of the racers during which deceased had failed to discover the approach of the car, and that during this moment deceased continued to proceed until it was too late to escape injury, and that he was thereby guilty of negligence precluding a recovery. It may be freely admitted that the deceased did not discover the approach of the car as early as the motorman discovered the approach of the deceased, but we are unable to see anything to the advantage of defendant's cause in such a condition of affairs. If the motorman discovered the deceased in a dangerous situation, and the jury have found that he did, it was his duty to use ordinary care to avoid injuring him, regardless of whether or not the deceased was aware of his approach, and the jury have found that he did not use such care.

That the evidence was sufficient to justify a conclusion that the motorman had the last clear opportunity to avoid the accident seems very clear. We shall have occasion to con-

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sider this contention of defendant again in discussing the instructions to the jury.

The motorman Myer, having been examined by defendant as to the circumstances of the accident, was asked: "Would you have moved that car in there if you had supposed thereby you were endangering the lives of other bicycle riders?" Plaintiffs' objection thereto was sustained. The witness then testified as follows: "I thought that it was best to move on at that juncture, because I thought I had plenty of time, and also that it was dangerous for me to stop the car at that time." It is unnecessary to discuss the question as to whether or not error was committed in sustaining the objection, for the subsequent testimony of the witness was a complete statement as to his reason for moving the car forward. He said that he thought he had plenty of time to cross, and that it would be dangerous to stop. This excludes any supposition that he was endangering the lives of the riders by moving on. What he would have done as to moving on, if he had supposed otherwise than he did, is entirely immaterial.

Complaint is made as to various instructions given at the request of the plaintiffs. It is urged that the jury may have concluded from plaintiffs' fourth instruction that they were authorized in finding a verdict against the defendant, although they may have believed that the motorman neither expressly nor impliedly intended to injure deceased or any one else. No purpose or design on the part of the motorman to injure was essential to defendant's liability, and the plain object of the instruction was to so inform the jury. By it (the jury) were substantially told that, although one might not have the actual intent to injure, still if there is on his part a reckless indifference or disregard of the natural or probable consequences of doing or omitting to do an act, and he does or fails to do the act, conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury, he is guilty of wanton negligence. We see no prejudicial error in this statement. *Esrey v. S. P. Co.*, supra; *Everett v. L. A. Con. Elec. Ry. Co.*, 115 Cal. 127, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; *Beach on Con. Neg.* §§ 55, 62.

Defendant's objection to plaintiffs' instructions 5, 6, 7, and 9 is that they are predicated upon an alleged erroneous theory of the law, viz.: That where the injured party's own negligence brings him into danger, and defendant discovers the danger in time to avoid ensuing injury by the exercise of ordinary care, and fails to exercise such care, the defendant is liable notwithstanding such negligence of the injured party, if he, the injured party, after discovering his own danger, exercises ordinary care to escape the injury. This, it is urged, relieved the injured party entirely from the consequences of his negligent failure to discover his own danger resulting from his own negligence. We see no

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force in the contention that the theory upon which it is said these instructions were predicated is erroneous. Such an instruction is applicable by its terms, only in the event that the defendant discovers the negligent injured party already in a dangerous position—discovers him under such circumstances as preclude him from indulging in any assumption that he, the injured party, can or will get out of the way. It is only because of such discovery that he is called upon to exercise ordinary care to avoid injuring him. Upon such discovery, it is his plain duty to use ordinary care to avoid injuring the negligent party, and if he has a clear opportunity to avoid such injury, i. e., "Such an opportunity as would necessarily be clear and plain to a man of ordinary intelligence and prudence in a given emergency," and fails to take advantage thereof, he is liable for the injury, provided the other is not negligent after he discovers the danger. In such a case, he who knows of the danger, and recklessly proceeds regardless thereof, can find no refuge in the fact that the injured party who does not know of it would have known if he had used reasonable care to ascertain it. In such a case, he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident. If a motorman should discover a man asleep on the track in front, and knowing him to be asleep, should proceed regardless of his position and condition, and run over him with his car while still asleep, there would very little question that the motorman had the last clear opportunity, and that his negligence was the proximate cause of the injury.

As said before, such a case has no feature in common with one where the circumstances are such that the defendant has the right to assume that the other party can and will protect himself, and consequently that he is not in a dangerous situation. There was no prejudicial error in the modification by the court of defendant's requested instruction 4. It was sought by this requested instruction to have the jury instructed that if the deceased was at the time of the race propelling his bicycle at a rate of speed in excess of eight miles per hour, and did not look for an approaching car until it was too late to bring his bicycle to a standstill so as to avoid a collision, and did not at any time attempt to reduce the speed of said bicycle before said collision occurred, he was guilty of "gross" negligence. The court modified this by adding, "Or did not attempt to turn it out of the way of said car before said collision occurred," as one of the prerequisites of gross negligence on the part of the deceased.

The defendant was not entitled to have the instruction given as requested. It is true that if deceased was riding at a rate of speed in excess of eight miles per hour, he was guilty of negligence as a matter of law, because of the city ordinance prohibiting such speed. That, however, was a

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matter fully covered by other instructions. Under the peculiar facts of this case, it was for the jury to say, taking into consideration all of the circumstances, whether a failure on the part of deceased to look for an approaching car in time to prevent a collision, or a failure to attempt to reduce the speed of the bicycle, was negligence at all, much less "gross negligence," which term we suppose was used as an equivalent of "willful or wanton" negligence. While it is true that the modification, under the undisputed evidence, took away the whole effect of the requested instruction, it did not add anything prejudicial to defendant's case, and, as the defendant was not entitled to the instruction at all, it cannot complain of the modification.

Certain instructions of defendant, directing a verdict in its favor if certain facts were found, were modified by adding a proviso of this character, viz.: "Unless you shall also find that the motorman in charge of defendant's car, after perceiving the dangerous situation then and there existing, did recklessly or wantonly send his car forward. Whether or not such reckless or wanton conduct of the defendant did occur and cause the collision is a question of fact for you to determine from the evidence, the same as you must determine other facts submitted." It is urged that these instructions make "recklessness" the equivalent of "wantonness," and that the terms are not synonymous. If one does a thing recklessly, without regard to the rights of another, he comes within the terms of the very definition of "wanton" cited by learned counsel for defendant, and if one, perceiving the dangerous situation of another, proceeds recklessly without regard thereto, there is little room for the claim that he is not doing a thing "recklessly without regard to the rights of another." We can see no distinction between the terms as used in these instructions.

We find no prejudicial error in the modification of defendant's requested instructions 10, 12, 15, 18, and 27. By instructions given, the jury were instructed in as favorable terms as defendant could ask as to what constituted ordinary care, as to the obligation of the deceased to exercise such care for his own safety, and as to proximate cause, and, further, in effect, that if they found that the collision was in any degree due to the want of proper care and caution on the part of deceased, and not to any intervening cause proceeding from the defendant, their verdict must be for defendant. The modification of the tenth requested instruction consisted entirely in the omission of matter which would have withdrawn from the jury all question as to the effect of the conduct of defendant after discovering the peril of deceased. The 12th requested instruction was erroneous, in that it precluded a recovery by the plaintiffs if the jury found that if the deceased had exercised ordinary care to have discovered the danger he would have discovered it in time to have avoided

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a collision, thus again withdrawing from the jury all consideration of the conduct of defendant, after discovering the peril of deceased. The omission by the court of the words, "and your verdict should be for defendant," which was the only modification made, was therefore not erroneous.

The portion of the fifteenth requested instruction that was omitted by the court was substantially covered by other instructions given.

The eighteenth requested instruction was erroneous, for the same reason as the tenth and twelfth, already noted. The requested instruction was to the effect that if the deceased, by looking or listening, with ordinary care might have discovered the car approaching, and did not exercise such care, he was guilty of such negligence as would prevent a recovery by plaintiffs, and the modification by the court consisted in the addition of the words, "as against any ordinary negligence of the defendant." This could not be understood, under the circumstances of this case and the other instructions, as importing any part of the doctrine of comparative negligence into the case. The words "ordinary negligence," as there used, plainly meant such negligence as might have existed on the part of defendant, in the absence of actual knowledge on its part of the perilous situation of the deceased, and a clear opportunity to avoid injuring him.

The twenty-seventh requested instruction was erroneous for the same reason as the tenth, twelfth, and eighteenth, and the modification thereof was proper.

Finally, it is claimed that the verdict is against law, in that it is contrary to an instruction wherein the jury were told that if they believed from the evidence that deceased approached the crossing where the accident occurred at a reckless rate of speed, without exercising any care or caution to ascertain whether any person was on or approaching the same, and that in consequence thereof the collision occurred, he was guilty of willful and wanton negligence, and their verdict must be for the defendant, notwithstanding any failure on the part of the motorman to exercise ordinary care.

In reply to this contention it is sufficient to say that, in our judgment, the evidence was not such that the jury was bound to find that deceased approached said crossing without exercising any care or caution to ascertain whether any person was on or approaching the same, or that in consequence of such approach the collision occurred.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

BALTIMORE & O. R. Co. v. STUMPF.*(Court of Appeals of Maryland, April 1, 1903.)*

[54 Atl. Rep. 978.]

Accident at Crossing—Gates—Ordinance—Contributory Negligence—Instruction.

An instruction that, if the crossing over defendant's tracks was a grade crossing, it was defendant's duty, under a city ordinance, to maintain safety gates, and keep the same closed on the approach of every train, and if such gates were maintained, but were open on the approach of a train, and plaintiff was struck and injured thereby while crossing the track, and if the gates had been closed the accident could have been avoided, then there was a want of ordinary care on defendant's part, was not objectionable as excluding the question of contributory negligence.

Same—Same—Same—Instruction.

The instruction was not objectionable as ignoring the causal connection between the violation of the ordinance and the happening of the accident.

Same—Contributory Negligence—Burden of Proof.

In an action against a railroad for injuries at a crossing, the burden was on defendant to show that plaintiff was guilty of negligence, and that such negligence directly contributed to the injury.

Same—Same—Same—Instruction.

A requested instruction that, in order for plaintiff to recover for injuries at a railroad crossing, it was not sufficient for him to show a possibility that the accident was caused by defendant's negligence, but he must convince the jury that the accident was more likely to have been directly caused by defendant's negligence, without negligence on the part of plaintiff directly contributing thereto, than that there was such negligence of plaintiff directly contributing to cause the accident, was properly refused as imposing on plaintiff the burden of proving the absence of contributory negligence.

Same—Same—Stop, Look, and Listen.

Where plaintiff was injured at a grade crossing in a city by reason of defendant's failure to close safety gates maintained at the crossing and, though plaintiff looked and listened before crossing the track, his view of the track on which he was struck was obstructed by cars standing on intervening tracks, and the train by which he was struck approached without sound, sign, or warning of any character, plaintiff was not guilty of contributory negligence in failing to stop before attempting to cross the track.

Same—Same—Same—Gates—Failure to Operate.*

Where defendant railroad company maintained safety gates at a grade crossing in a city, at which plaintiff was injured by defendant's failure to have the gates closed while the train which struck plaintiff was traveling over the crossing, requested instructions as to plaintiff's duty to stop, look, and listen before going on the track, and to know whether a train was coming, which ignored the implied assurance of safety from the open gates, were properly refused.

Same—Care Required of Driver of Vehicle—Instruction.

A requested instruction that plaintiff could not recover for injuries at a grade crossing if at the time he drove on the track "he knew that

*As to whether invitation to cross is implied from fact that crossing gates are open, see notes, 5 Am. & Eng. R. Cas., N. S., 666; 7 Am. & Eng. R. Cas., N. S., 742; 9 Am. & Eng. R. Cas., N. S., 709; *Woehrle v. Minnesota Transfer Ry. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 529; *Fennell v. Harris* (Pa.), 9 Am. & Eng. R. Cas., N. S., 709; *Roberts v. Delaware & H. Canal Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 664.

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he was unable to tell" whether a train was coming or not, but relied absolutely on the open gates and the watchman's absence, was erroneous, as substituting actual knowledge that no train was approaching for due care to ascertain such fact, as the test of plaintiff's right to recover.

Appeal from Baltimore Court of Common Pleas; Henry D. Harlan, Judge.

Action for personal injuries by Frederick Stumpf against the Baltimore & Ohio Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff's fourth prayer, and defendant's first, sixth, and seventh prayers, referred to in the opinion, are as follows:

Plaintiff's fourth prayer: "In order to defeat a recovery in this suit on the ground of contributory negligence on the part of the plaintiff, the burden of proof is upon the defendant to show that the plaintiff was guilty of negligence, and that such negligence on his part directly contributed to produce the injury."

Defendant's first prayer: "It is not sufficient, in order to recover, that the plaintiff should show a possibility that the accident was caused by the defendant's negligence, but the plaintiff, in order to recover, must convince the jury, by evidence, that the accident is more likely to have been directly caused by the negligence of the defendant, without negligence on the part of the plaintiff directly contributing thereto, than that there was such negligence of the plaintiff directly contributing to cause such accident."

Defendant's sixth prayer: "The court instructs the jury that if the plaintiff could, by stopping, looking, and listening before going on the defendant's track, have known of the approach of the train in time to have avoided the accident, and that the said plaintiff went upon the defendant's track without knowing whether a train was coming or not, and the accident happened for that reason, then the said plaintiff is not entitled to recover."

Defendant's seventh prayer: "Plaintiff cannot recover if at the time he drove upon the track he knew that he was unable to tell whether a train was coming or not, but relied absolutely upon the open gates and the watchman's absence."

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

W. Irvine Cross and Duncan K. Brent, for appellant.

Wm. Colton and William S. Bryan, Jr., for appellee.

PEARCE, J. At the trial of this case two exceptions were taken by the defendant to the admission of evidence, but these were abandoned at the argument in this court, and the only remaining exception is to the ruling on the prayers.

On April 17, 1901, the plaintiff was driving a grocery wagon, drawn by a quiet horse, on Bayard street, in the city of Baltimore, at a point where the tracks of the Baltimore & Ohio Railroad cross said street at grade, and where safety

gates are maintained by the railroad company as required by section 791 of the city charter (Laws 1898, p. 543, c. 123). There are four tracks at that point, and the plaintiff's view of trains approaching from the west was obstructed for about 600 feet from the crossing by a row of coal cars standing upon one of these tracks. He testified that as he drew near the crossing he saw the safety gates were open, but he did not see the watchman; that he looked four times both ways, and saw no train or engine approaching, nor any smoke or other sign of an engine; that he listened, and heard no bell nor whistle, nor any sound of any approaching train, and kept on till he was on the crossing; that while crossing the second track he was struck by an express train coming from Washington, which he could not see or hear until just before it struck him, destroying his wagon and injuring him, for which the jury awarded him \$1,800.

The plaintiff offered four prayers all of which were granted, and the defendant offered seven, of which the second, third, and fourth were granted, and all the others were refused. The plaintiff's first and second prayers have been repeatedly sanctioned by this court where the case is allowed to go to the jury, and need not be again considered. But it was very earnestly argued that there was error in granting the plaintiff's prayers 1½ and 4, and in refusing the defendant's first, fifth, sixth, and seventh prayers.

By the plaintiff's first prayer, and by defendant's second, third, and fourth prayers, the finding of the two essential elements of recovery in any case of this character, namely, the negligence of defendant directly causing the injuries sustained, and the absence of negligence on the part of the plaintiff directly contributing thereto, was fully and fairly submitted to the jury.

The plaintiff's prayer 1½ told the jury that, if they found the crossing in question was a grade crossing, then, under the section of the charter offered in evidence, it was defendant's duty to maintain a safety gate at that point, and to keep the same closed on the approach of every train or locomotive until the same has fully passed, and if they found said gate was maintained, but was open, and not closed, on April 17, 1901, on the approach of a train and locomotive, and that plaintiff was struck and injured thereby while crossing said track, and that, if said gate had been closed on the approach and during the passage of said train, the accident could have been avoided, then there was a want of ordinary care on the part of the defendant, as mentioned in the plaintiff's first prayer. The defendant objects to this prayer, first, that it excludes the question of contributory negligence; and, second, that it ignores the causal connection between the violation of section 791 and the happening of the accident. The first objection might be valid if the prayer went to the right of recovery, but it does not so conclude. It merely

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declares that certain facts, if found by the jury, constitute want of ordinary care, and identifies that want of ordinary care as the same which must have caused the injury complained of, without any contribution thereto from any want of ordinary care on the part of the plaintiff. It cannot be questioned that the violation of such a requirement is negligence, though not causing injury; and although the jury might find all the facts, under that instruction, which the court declared would establish want of ordinary care on the part of the defendant, yet they could not, either under that instruction alone, or in connection with the first prayer, to which it referred, find for the plaintiff, unless they also found he was not guilty of contributory negligence. Nor does it ignore the causal connection between the violation of section 791 and the happening of the accident. The criticism to that effect is a mere verbal criticism, upon which grammarians might differ; but to practical men, not concerned about nice discrimination in words, this expression could not be understood otherwise than as meaning that the accident would not have happened, and would not suggest any question of supervening negligence, as argued by defendant's counsel. This prayer is a nearly literal reproduction of the plaintiff's second prayer in *McDonnell's Case*, 43 Md. 537, and in approving it Judge Grason said, "The defendant was certainly guilty of negligence in so running its cars, if the jury believe from the evidence that the accident could have been avoided if the car had not been running at a greater speed than was allowable under the ordinance," and these words were used in reply to the exact argument made by counsel in the present case as to supervening negligence. We find no error in granting this prayer, which we think is quite within the ruling in *Stebbing's Case*, 62 Md. 517.

The plaintiff's fourth prayer, as to the burden of proving contributory negligence, is the same approved in *Hogeland's Case*, 66 Md. 162, 7 Atl. 105, 59 Am. Rep. 159, and there said to have been repeatedly sanctioned. A late and interesting consideration of this question is found in *Tucker v. State*, use of *Johnson*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181, where death resulted from a pistol shot fired in alleged necessary defense of defendant's servant. The court said on page 480, 89 Md., page 781, 43 Atl., 46 L. R. A. 181: "It has been held over and over again in this state that, if a suit is brought under this statute for the negligence of the defendant, the burden is on the plaintiff to prove the negligence, yet, if the plaintiff's testimony makes out a *prima facie* case of negligence, and does not disclose want of care on the part of the deceased, the burden is on the defendant to establish contributory negligence, if that is relied on. *Frech's Case*, 39 Md. 574; *Hauer's Case*, 60 Md. 462; *Steever's Case*, 70 Md. 75, 18 Atl. 1032; and many others that might be cited. So, although by the terms of the statute the plaintiff in such

cases can only recover by proving that the death of the person was caused by the negligence or default of the defendant, the defendant has the burden cast on him to prove that the proximate cause of the injury was the negligence of the deceased, and that, too, notwithstanding the plaintiff is required to prove, as part of his case, that the negligence of the deceased did not directly contribute to the injury. The latter may be satisfied by the presumption of due care, and the known and ordinary disposition of men to guard themselves against danger, when the plaintiff's testimony as to the accident does not show affirmatively that the deceased did directly contribute to the injury." In opposition to this clear and logical statement of the law upon this point, the defendant's counsel, in his brief, says: "It is the duty of the plaintiff to show how the accident happened, as proof that it was caused by the negligence of defendant. In doing this, he must necessarily negative the other possible explanations. The theory of pure accident, or the theory of plaintiff's negligence, original or contributory, are open as possible causes. He must show negligence of defendant as direct cause, and, in doing so, must negative negligence of the plaintiff." To sustain this argument he cites this passage from *Balt. Traction Co. v. Helms*, 84 Md. 525, 36 Atl. 119, 36 L. R. A. 215: "By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant, and the injury which followed, but he is bound also to establish by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of defendant's negligence." However that language might have been regarded if it stood apart from any qualifying language, and if that case had been the first in this court dealing with this rule, it is impossible to suppose that the learned and careful judge who delivered that opinion intended to overrule, without even mentioning, the various cases in which it had been held that the burden of proof in this regard is on the defendant; and it is perfectly apparent from the very next sentence in that opinion that the defendant's counsel in this case has misconceived the meaning of the language cited, for the court goes on to say, "The right to recover depends upon two distinct propositions of fact: First, the negligence of defendant; and, secondly, the exercise of due and ordinary care by the plaintiff; and if he fail to prove negligence on the part of the defendant, or if it appears from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover." In the face of all the authorities in this state, we cannot perceive how the correctness of this prayer can be seriously questioned.

The defendant's first prayer is an attempt to impose by ingenious indirection upon the plaintiff the burden of proving

absence of contributory negligence, and is wholly irreconcilable with plaintiff's fourth prayer. The first three lines of defendant's first prayer assert an admitted proposition—that the negligence of defendant causing the injury must be a legitimate deduction or inference from established facts, and not a mere speculation or conjecture, which is never the equivalent of proof. But the prayer then proceeds to assert that the plaintiff must convince the jury by evidence that it is more likely that there was, than that there was not, contributory negligence on plaintiff's part; thus practically reversing the established rule as to the burden of proof upon this point, and permitting contributory negligence to be founded upon speculation or conjecture, while denying resort to this means for establishing defendant's negligence. This is not only unreasonable and without authority, but in direct disregard of Geis' Case, 31 Md. 367, 100 Am. Dec. 69, where a prayer in a case of this character was disapproved because it required "affirmative proof, as a condition to the right to recover, that the deceased did not by his own neglect or want of care contribute to the accident." These objections are fatal to this prayer.

The defendant's fifth prayer, which was refused, asked that the jury be instructed that the fact that the safety gates were open, and the gateman absent, did not in itself justify the plaintiff in going upon the track, but that it was his duty to stop, look, and listen before going on the track. As it is a conceded fact that the plaintiff did not stop, though he did look and listen, this prayer, if granted, would, in effect, have taken the case from the jury. This is the first case in this court in which it has been sought to apply the rule of stop, look, and listen, arbitrarily, to a case where safety gates required by law to be kept closed on the approach of a train, were open as the traveler approached the crossing, and we have given it careful consideration. It may be conceded unhesitatingly that the mere fact that such gates are open cannot alone, and in all cases, justify a traveler in going upon the track at the crossing, and that there are cases in which it may be the traveler's duty to make independent observation by stopping, as well as by looking and listening, before doing so. The case of Pa. R. R. v. Pfuelb, 60 N. J. Law, 278, 37 Atl. 1100, is such a case. There the proof was that, though the gates were up as plaintiff approached, an east-bound train was then passing, and he waited until it passed, and then went upon the track, and was struck by a train coming in the opposite direction, which he could not have failed to see if he had looked; and the court properly said, "He knew the gateman had neglected his duty, and that he could not rely with confidence upon the fact that the gates were up." So, also, if one seeing the gates up, but also seeing an approaching train near at hand, should attempt to cross before it merely because the gates were open, or be-

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cause he chose to risk the experiment, the open gate could not relieve him of the consequences of his own want of due and ordinary care. None of the cases in this court in which the failure to stop, look, and listen before crossing a railroad track has been declared negligence per se, from Hogeland's Case, in 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, to Roming's Case (October term, 1902) 53 Atl. 672, have involved the question of safety gates, and none of them have announced any principle which would either require, or, in our opinion, justify, the application of the rule invoked to such a case as the present. In Roming's Case the Baltimore & Ohio Railroad voluntarily maintained a gate at the crossing in question, but it was operated only in the daytime, and did not enter into the consideration of that case. The rule has been so applied in Pennsylvania, but the great weight of authority in England and America is the other way. In *Directors, etc., of Northeastern Ry. Co. v. Wanless*, 7 Eng. & Irish Appeals, 12, Lord Cairns held, where it was the duty of the railway to keep the gates closed when any train is approaching, that the fact that they were open "amounted to a statement and notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury"; and the same was held in *Stapley v. London, B. & S. C. Ry. Co.*, L. R. 1 Exch. 21, and in *Lunt v. London & N. W. Ry. Co.*, L. R. 1 Q. B. 277. In the last case, Lord Blackburn observed: "It could make no difference whether the gatekeeper expresses that the road is safe, by opening the gate, or by words or gestures." This is the view held in the following cases in this country: *Grand Trunk Railroad v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Dolan v. Del. & Hudson Canal Co.*, 71 N. Y. 288; *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. N. Y. Cent. R. R.*, 112 N. Y. 234, 19 N. E. 678; *Chicago, Rock Island & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Rohde v. Chicago & Northwestern R. R.*, 86 Wis. 312, 56 N. W. 872; *Evans v. Lake Shore & Mich. Sou. R. R.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; *Wilson v. N. Y., N. H. & H. R. R. (R. I.)* 29 Atl. 258; and in many other cases which might be cited. In *Glushing v. Sharp*, supra, the court said, "The open gate was a substantial assurance of safety—just as significant as if the gateman had beckoned or invited him to come on—and that an ordinarily prudent man would not be influenced by it is against all human experience." In *Dolan v. Del. & Hudson Canal Co.*, supra, it was held that the negligence of a flagman to give warning and properly to discharge his duty, or in absenting himself from his post, even where no law required the keeping of a flagman, is imputable to the company, and that where plaintiff's evidence tended to show that he looked and listened for the usual signals and evidences of danger, and neither saw nor heard any, and where obstructions by cars standing on the tracks prevented his seeing and

hearing the approaching train, it could not be held, as matter of law, that it was the plaintiff's duty to have stopped his horses and gone forward to see if a train was approaching. Chief Justice Church said: "The vigilance which the evidence tended to show that the plaintiff exercised is all that has been required as matter of law. There may be cases where a higher degree of vigilance might be regarded as proper, but those are exceptional cases, which must be left to the jury on the facts." In *Wilson v. N. Y., N. H. & H. R. R.* (R. I.) 29 Atl. 258, Chief Justice Matteson said: "The word 'invitation,' though sometimes used in the opinions of learned courts, evidently was designed to mean only that the leaving open of the gates amounted to an implied assurance that the track might be safely crossed. Thus understood, the authorities are numerous (the only cases to the contrary that have come to our attention being cases in Pennsylvania) that open gates, or the absence of the usual signals of an approaching train or engine, are implied assurances that no train or engine is approaching the crossing with intent to cross the street, upon which travelers on the street have a right to rely, and that, if a traveler on the street be injured while crossing the railroad in such circumstances, the question whether he was guilty of contributory negligence is for the jury." In *Evans v. Lake Shore R. R.*, supra, the court said: "The public have a right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties." In *Palmer v. N. Y. Cent. R. R.*, 112 N. Y. 241, 19 N. E. 678, 37 Am. & Eng. R. Cas. 533, the court said: "When, therefore, he moves on upon the track under an assurance of safety from those owning it, and from their servants, whose special duty it is to keep their attention fixed upon it, and who have within their power the means of avoiding the infliction of injury, and whose business it is to use them so as to prevent danger, it is for the jury to say whether the traveler exercised that ordinary care and prudence which, under the circumstances, it would be natural to expect." Even in Pennsylvania, where, as we have seen, the traveler is held to stricter account than in any other state, in the recent case of *Roberts v. Del. & Hudson Canal Co.*, 177 Pa. 190, 35 Atl. 723, the following instruction was held correct: "Safety gates, which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross; and, while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances." We have thus, perhaps at undue length, endeavored to extract from some of the leading cases the views of the courts upon the point under consideration; and

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while we have not been furnished with, and have not found, any Maryland case involving the exact question, the principle deduced from the cases we have cited, seems to be plainly recognized in *Phil., Wilm. & Balt. R. R. v. State, Use of Gunther*, 66 Md. 510, 8 Atl. 272, in which Judge Alvey said: "If the equitable plaintiff was really misled by any such misconduct of the flagman as was calculated to mislead a rational person, in the exercise of reasonable care, under all the circumstances of the case, and, by reason of the fact that he was so misled, the accident occurred, then the right of action would exist, and the plaintiff would be entitled to recover." For the reasons that we have stated, we think this prayer was properly rejected.

The defendant's sixth and seventh prayers both ignore all question of the assurance of safety implied in the open gates, which was a fact necessary to be considered by the jury; but, apart from this objection, they are defective in declaring that if the plaintiff went on the track without knowing whether a train was coming or not, and the accident happened for that reason, then the plaintiff could not recover. He knew the gates were required to be closed when a train or engine was approaching, and, if he knew a train or engine was approaching, he knew the open gates were not then an assurance of safety; and, under such circumstances, if he were injured, his own negligence would defeat his recovery. On the other hand, if he in fact actually knew a train or engine was not approaching, there would be no source of danger, and no occasion for vigilance or caution. These prayers substitute, as the test of recovery, actual knowledge that no train or engine was approaching, for the due care and caution required by the law in endeavoring to ascertain this fact. The right of recovery does not depend upon the accuracy of the plaintiff's information as to the approach of the train, but upon the measure of care and caution exercised to obtain accurate information under all the circumstances of the case.

We think the whole law of the case was fully covered by the granted prayers, and the judgment will be affirmed.

Judgment affirmed, with costs above and below.

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(Supreme Court of Iowa, Oct. 23, 1903.)

[96 N. W. Rep. 984.]

Fire Set by Locomotive—Destruction of Meadow—Measure of Damages.

In an action against a railroad company for damages caused by burning a part of a meadow adjacent to the right of way, the measure of damages was the cost of reseeding and the rental value of the land during the time it was rendered unproductive for the purpose for which it was being used, as shown by evidence of what portions of the land not burned actually produced, and not the general rental value of land in that vicinity.

Black v. Minneapolis & St. L. R. Co**Same—Same—Damages—Interest.**

In an action against a railroad company for the burning of a meadow, the jury were properly allowed to add interest to the damages which they found plaintiff sustained at the time of the fire.

Same—Origin—Evidence—Sparks Thrown by Other Engines.*

In an action against a railroad company for the burning of certain hay located some distance from the track, evidence that other engines than the one which was claimed to have set the fire had been seen to throw sparks nearly as far as the hay was from the track was admissible, it appearing that all the engines were in substantially the same condition.

Same—Same—Circumstantial Evidence.†

In an action against a railroad company for setting fire to hay near the track, evidence that within a few minutes after the passing of defendant's locomotive, and while a strong wind was blowing from the direction of the track towards the hay, it was first discovered to be on fire, was sufficient to justify a finding that the hay was set on fire by sparks from the locomotive.

Killing Steer on Track—Double Damages—Estoppel—Concessions by Counsel.

In an action against a railroad company for killing a steer on the track, a concession of plaintiff's counsel that plaintiff was not entitled to recover double damages under the statute did not estop him from afterward claiming double damages, the right thereto growing out of the statute, and not requiring any evidence other than that required to establish a cause of action, so that defendant was not prejudiced by the withdrawal of the concession.

Same—Notice.

Code, § 2055, provides that double damages are to be allowed against a railroad company for killing stock if the company fails to pay for the stock within 30 days after notice in writing that the loss or injury has occurred, etc. A notice of the killing of stock was addressed to the M. & St. L. "Railway" Company, while the name of the corporation was the M. & St. L. "Railroad" Company, the name given in the notice being the name of a predecessor of the defendant which had formerly owned the same line of road. The notice, however, was actually served upon and brought to the personal attention of the proper officer of the defendant company, and the affidavit referred to the M. & St. L. "R. R." Company, and stated that the stock was killed by said "railroad" company: *held*, that the notice was not insufficient because using the term "railway" instead of "railroad."

Judicial Notice—Jurat.

The court will take judicial notice that the person whose name appears to a jurat was a notary public in and for the county named, and will presume that he acted within the county of his jurisdiction.

Jurat—Affidavit.

It is not essential that the jurat state that an affidavit was sworn to in the presence of or before the notary who verifies the fact; that will be presumed from the statement that the affidavit was sworn to.

Killing Stock on Track—Value—Evidence.

In an action against a railroad company for the killing of stock, in which plaintiff claimed double damages under the statute (Code, § 2055),

*See *MacDonald v. New York, etc., R. Co.* (R. I.), 7 R. R. R. 792, 30 Am. & Eng. R. Cas., N. S., 792; monograph appended to *Texas & P. Ry. Co. v. Rutherford* (Tex. Civ. App.), 3 R. R. R. 334, 26 Am. & Eng. R. Cas., N. S., 334.

†See foot-note appended to *Carter v. Pennsylvania R. Co.* (C. C. A.), 7 R. R. R. 558, 30 Am. & Eng. R. Cas., N. S., 558; *Burlington & M. R. Co. in Nebraska v. Burch* (Colo.), 4 R. R. R. 21, 27 Am. & Eng. R. Cas., N. S., 21; *McGinn v. Platt* (Mass.), 19 Am. & Eng. R. Cas., N. S., 245.

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defendant's tender to plaintiff of a certain sum, which plaintiff claimed to be the value of the stock, was sufficient evidence of the value of the stock to form a basis for the recovery of double damages.

Appeal from District Court, Webster County; J. H. Richard, Judge.

Action to recover on four distinct causes of action, viz.: Damage to plaintiff's meadow caused by a fire set out by defendant's locomotive; destruction of certain hay by a fire set out at another time by defendant's locomotive; the killing of a steer by defendant's locomotive on its track at a place where defendant had a right to fence, the steer having come upon the right of way at such place by reason of a defective and insufficient cattle guard; and the similar killing of certain pigs which came upon defendant's right of way by reason of insufficiency of defendant's fence. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

R. M. Wright, for appellant.

Kenyon & O'Connor, for appellee.

McCLAIN, J. 1. As to the injury to the meadow, the sole question is one of measure of damages. A fire set out by defendant's engine in September burned over about eight acres of wheat stubble, among which grass was growing as the result of the sowing of grass seed with the wheat. But for the fire this grass would, it appears, have furnished pasture during the fall, a hay crop during the next summer, and further pasture after the cutting of the hay during the following fall; and witnesses testified that, although the land was reseeded in the spring following the fire there was no hay crop for that summer, nor pasturage during the following fall. The court instructed the jury that they might allow, as damages for the injury to the meadow, the actual cost of reseeding, and the fair and reasonable rental value for the time necessary to restore the meadow, during which the land was unproductive as a meadow as the result of the fire, less the fair and reasonable value of the use, if any, which plaintiff could have made of the land without interfering with its restoration as a meadow; and the jury by a special finding fixed the damage at \$150. It appears from the evidence that the cost of reseeding was \$10, the loss of pasturage for the two seasons was \$20, and that, on the basis of what other portions of land in a similar situation and under similar conditions produced in hay during the season following the fire, the rental value of the eight acres for the purpose of raising hay would have been \$120, although it appeared by other witnesses that the rental value of the land for ordinary purposes was not to exceed \$3 per acre. The contention of counsel for appellant is that the court erred in allowing the introduction of evidence with reference to what the land would have produced in hay during the season if it had not been burned over, based on what other portions of the land constituting

the meadow did actually produce, and in so instructing the jury as to allow them to take into account the amount of injury suffered, estimated on this basis. It is urged that the loss must be measured by the condition of the meadow at the time of the fire, and that it could not then be determined what the value of the prospective hay crop was; and therefore the rental value in general, and not the rental value as determined by what the balance of the meadow should actually produce, would be the measure of the loss.

We think, however, that counsel takes a fundamentally erroneous view as to the measure of damages in such cases. While it is true that the mere prospective use of land for a specific purpose, and the profits which would actually have resulted from such use, cannot be taken into account (*Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626), yet, where the land has been appropriated to a particular use, as by converting it into an orchard or a meadow, or planting it to a crop which is already growing at the time of the injury, the loss must be determined with reference to such existing condition. *Rowe v. Chicago & N. W. R. Co.*, 102 Iowa, 286, 71 N. W. 409; *Lommeland v. St. Paul, M. & M. R. Co.*, 35 Minn. 412, 29 N. W. 119; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa, 562, 82 N. W. 996; *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392; *Krejci v. Chicago & W. R. Co.*, 117 Iowa, 344, 90 N. W. 708. "A meadow is in the nature of a permanent improvement, and is not like annual crops. Its value is largely based upon the fact that it possesses this character, and is not to be planted each year." *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa, 606, 616, 24 N. W. 234, 55 Am. Rep. 279. As to the competency of the evidence with relation to what was actually produced during the season in question on other portions of the meadow of like character and under similar conditions, appellant's objections are not well taken. It must be borne in mind that this is an action for tort, and that the damage recoverable is not what the defendant might have anticipated as the consequence of the injury, but that which follows as the natural and proximate result of the injury, and it was competent to show by the best evidence obtainable what the meadow would probably have produced had the injury not occurred. It was, therefore, competent to show what the product of the other portions of the meadow not injured actually was. *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Flick v. Wetherbee*, 20 Wis. 392; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Railway Co. v. Yarborough*, 56 Ark. 612, 20 S. W. 515; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170; *Randall v. Raper, F. B. & E.* 84, Eng. Com. L. 82. Some of these cases, it is true, relate to damages for loss of crop due to defective seed sold to the person

planting the crop, and therefore involved breach of warranty rather than tort. But to authorize recovery in an action for breach of contract, the injury must be the natural and proximate result of the breach, and to this extent the measure of damage is the same as in an action for tort. Of course, the rule for measuring damages in actions for breach of contract may exclude damages which would be recoverable in case of tort, because not within the reasonable contemplation of the parties, but where the proper measure is the natural and proximate result of the wrong, and does not involve the question as to what damage was within the contemplation of the parties, we see no reason why it should not be the same in each class of cases. The rule excluding profits which are speculative and uncertain has reference rather to the matter of proof than to the measure of damage, and, where there is competent evidence as to the loss of profits, such loss may be taken into account. *Hichhorn v. Bradley*, 117 Iowa, 130, 90 N. W. 592.

What the plaintiff actually lost in this case was the pasturage and the hay crop, and, as there was competent evidence as to what the burned portion of the meadow would actually have produced, the rental value of the land as meadow for the season during which plaintiff was deprived of its use, for the purpose of raising a crop of hay thereon, might be determined by the jury and taken into account in fixing the damage. In this connection it is proper to notice a complaint that the court authorized the jury to allow interest at 6 per cent. on the damage to the meadow as found above. It is true that the damage was unliquidated, and plaintiff is not entitled as a matter of law to interest. But it is well settled that, in estimating even unliquidated damages, the jury may take into account interest on the sum found necessary to compensate the plaintiff for the injury suffered at the time of the loss, on the theory that such interest is a part of his damage. *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422, 502; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620; *Richards v. Citizens' Nat. Gas Co.*, 130 Pa. 37, 18 Atl. 600; *Lincoln v. Claffin*, 7 Wall. 132, 139, 19 L. Ed. 106. As the verdict of the jury was with reference to the money loss sustained by the plaintiff at the time of the fire, they were properly told that they might, as an element of damage, include interest on the amount of such loss.

2. As a distinct cause of action against the defendant, plaintiff alleges the destruction of certain hay and a hay rack on plaintiff's land, which were destroyed by fire communicated thereto by sparks from a locomotive operated on defendant's road. With reference to this item, the only controversy is as to the evidence relied on as showing that sparks from the locomotive set the fire which resulted in the destruction of the hay and rack. There being some evidence that the hay was situated 106 feet from the defendant's track, witnesses testified that it was impossible for fire to be communi-

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cated by sparks carried that distance. On the other hand, witnesses were allowed, over defendant's objection, to testify that they had seen engines of the defendant throw sparks to the distance of 100 feet, such testimony relating to other engines than the one supposed to have emitted the sparks which set the fire. But, as there was evidence that all the engines were in substantially the same condition, this testimony was admissible.

It is also contended that there is no evidence whatever that the hay was set on fire by sparks from the locomotive of defendant. But witnesses for the plaintiff did testify that within a few minutes after the passing of defendant's locomotive along the track, and while a strong wind was blowing from the direction of the track towards the hay, the hay was first discovered to be on fire. From this evidence the jury was justified in finding that the hay was set on fire by sparks from the locomotive. *Greenfield v. Chicago & W. R. Co.*, 83 Iowa, 270, 49 N. W. 95.

3. With reference to the recovery for killing the steer on defendant's track, at a place where it had a right to fence, the contention of appellant is, in the first place, that it appeared the steer came upon the inclosed right of way over the cattle guard, and that there is no competent evidence that the cattle guard was out of order. Without setting out the evidence, we are constrained to say that there was competent testimony to show that the cattle guard was out of order and ineffective, and it was for the jury to determine whether the defective condition of the cattle guard was the occasion of the steer's being on the inclosed portion of the right of way.

It is further urged, however, with reference to this cause of action, that the attorney for plaintiff conceded, during the trial, that there was no right to recover double damages in such case, and it appears that such concession was made of record. But as the right to recover double damages under such circumstances depended upon the construction of the statute, and not upon any facts which it was necessary to prove beyond those which were proved, to wit, the killing of the animal, the defective cattle guard over which the animal came upon the inclosed right of way, and the giving of the statutory notice, we cannot see that this concession of counsel was in any way material. Plaintiff's counsel was not estopped from urging, later in the progress of the case, that, as matter of law, on the evidence introduced, plaintiff could recover double damages; and the court was therefore justified, on the motion of plaintiff, in adding to the verdict of the jury a sum equal to the actual value of the animal as found by the jury in answer to a special interrogatory. That a concession of counsel, inadvertently made, may be withdrawn where the opposite party is in no way prejudiced thereby as to the determination of the facts, is well settled. *Prescott v. Brooks* (N. D.) 94 N. W. 88; *St. Louis & S. F. R. Co. v. Apperson*, 97 Mo. 300, 10 S. W. 478.

4. Finally, with reference to the recovery of double damages for the killing of plaintiff's pigs, the only controversy is as to the sufficiency of the statutory notice, under the provisions of Code, § 2055. Under that section double damages are to be allowed if the company fails or neglects to pay the value of the stock killed "within thirty days after notice in writing that the loss or injury has occurred, accompanied with an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation," etc. The first objection to the notice is that it misdescribes the defendant, being addressed to the Minneapolis & St. Louis "Railway" Company, instead of to the Minneapolis & St. Louis "Railroad" Company, and counsel for appellant argues that this was a material misdescription, because there has been such a corporation, the predecessor of the defendant in the ownership of this same line of road. But the notice was actually served upon and brought to the personal attention of the proper officer of the defendant company, and we are not willing to hold that the defendant was justified in ignoring that notice on account of a slight inaccuracy in designating such company. The affidavit and notice are to be taken together. *Mendell v. Chicago & N. W. R. Co.*, 20 Iowa, 9. The notice described the location of the right of way where the animals were killed, with reference to the section of land through which it is located, and also as running through plaintiff's farm. In the affidavit the "bed" of the "M. & St. L. R. R." is referred to, and it is stated that the pigs were killed by said "railroad company." The notice and affidavit were clearly sufficient under the statute. At the beginning of the affidavit the venue is given, "State of Iowa, Webster County, ss.," and at the end, after the signature of plaintiff, the jurat, as originally attached, was as follows: "Subscribed and sworn to by J. B. Black this 22nd day of June, 1901. Maurice O'Connor, (seal) Notary Public." It is urged that this jurat is not sufficient, because it does not show in whose presence or before whom it was sworn to, nor that the person signing it as notary public was a notary in and for the county within which it was sworn to. But these objections are without any merit. The court takes judicial notice that the person whose name appears to the jurat was a notary public in and for the county named, and it presumes that he acted within the county of his jurisdiction. *Stoddard v. Sloan*, 65 Iowa, 680, 22 N. W. 924; *Stone v. Miller*, 60 Iowa, 243, 14 N. W. 781. It is not essential that the jurat state that the affidavit was sworn to in the presence of or before the notary who verifies the fact by his certificate. That fact is presumed from the official statement that the affidavit was sworn to. *Hosea v. State*, 47 Ind. 180; *Trice v. Jones*, 52 Miss. 138; *Commonwealth v. Keefe*, 7 Gray, 332; *Clement v. Bullens*, 159 Mass. 193, 34 N. E. 173; 2 Cyc. 28. A similar presumption is entertained when the jurat fails to state by

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whom the affidavit was signed and sworn to. *Briggs v Yetzer*, 103 Iowa, 342, 72 N. W. 647. The notice and affidavit were therefore sufficient to sustain the recovery of double damages by the plaintiff for the value of the stock killed.

It is further contended, with reference to the pigs, that there was no evidence of the value on which to predicate the recovery of double damages. But in one division of defendant's answer, relating to this cause of action, it is averred that defendant "tenders to the plaintiff the sum of thirty-five dollars, which the plaintiff claims to be the value of the pigs, and it denies each and every other allegation in the said count of the said petition contained." And counsel for defendant, in his opening statement, said, "We come into court and tender Mr. Black, not the value that we claim that the pigs were, but the value he himself places upon the pigs, namely, thirty-five dollars." Counsel's contention now seems to be that, while this tender relieved plaintiff of the necessity of proving the value of the pigs for the purpose of recovering simple damages, it did not afford the basis for the recovery of double damages. But the distinction is so subtle that we have been unable to grasp it. The plaintiff is entitled to double damages, provided he shows the statutory notice and affidavit, and failure of the railroad company to pay within 30 days; and, if the admission is sufficient to establish the value for the purpose of recovering simple damages, certainly no more evidence of value was necessary in order to entitle plaintiff to recover double damages. A payment of money into court during trial, even without a plea of previous tender, operates as a tender from that date, and admits so much of the cause of action. *Ye Seng Co. v. Corbitt* (D. C.) 9 Fed. 423, 431.

The judgment of the lower court is affirmed.

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(*Supreme Court of North Carolina, June 6, 1903.*)

[44 S. E. Rep. 663.]

Injury to Employee—Negligence—Question for Jury.

In an action against a railroad for injuries sustained by a servant by being run into by an engine while he was painting a switch target, evidence considered, and *held* that it was a question for the jury whether defendant was negligent.

Same—Contributory Negligence—Question for Jury.

In an action against a railroad for injuries to a servant, owing to his having been run into by a locomotive while painting a switch target, evidence considered, and *held* that it was a question for the jury whether plaintiff was guilty of contributory negligence.

Same—Same.

Evidence considered, and *held* that it was a question for the jury whether, if plaintiff's negligence contributed to his injury, defendant, by the exercise of ordinary care, could have avoided the injury.

*Smith v. Atlanta & C. Air Line R. Co***Negligence—Speed in Violation of Ordinance.***

In an action against a railroad company for injuries, the fact that an engineer was running at a greater speed than allowed by ordinance was evidence of negligence.

Same—Care Required in Moving Engine in Yard.

It is the duty of a locomotive engineer to ring the bell while moving his engine in the yard, and use all reasonable efforts to avoid injuring servants engaged in work in the yard.

Same—Violation of Rules.

It is the duty of a railroad engineer moving an engine in the yard to observe the rules of the company relative to warnings to persons in dangerous situations, and relative to the means to be employed to avoid the infliction of injuries.

Same—Negligence and Contributory Negligence.

In an action against a railroad for injuries sustained by a servant by being run into by an engine while he was painting a switch target, the burden was on plaintiff to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care.

Negligence.

If the servant had negligently placed himself in dangerous proximity to the track, and so worked with his head down, unaware of the approach of the engine, and the rules required those in charge of trains,

*As to whether the violation of an ordinance limiting speed of trains is negligence, see foot-note appended to *Edwards v. Chicago & A. Ry. Co.* (Mo. App.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333; foot-note appended to *Jones v. Charleston & W. C. Ry. Co.* (S. Car.), 7 R. R. R. 702, 30 Am. & Eng. R. Cas., N. S., 702; *Shatto v. Erie R. Co.* (C. C. A.), 7 R. R. R. 127, 30 Am. & Eng. R. Cas., N. S., 127; *Edwards v. Chicago & A. Ry. Co.* (Mo. App.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333; *Kansas City Suburban Belt Ry. Co. v. Herman* (Kan.), 2 R. R. R. 577, 25 Am. & Eng. R. Cas., N. S., 577; *Brasington v. South-Bound R. Co.* (S. Car.), 1 R. R. R. 552, 24 Am. & Eng. R. Cas., N. S., 552; *Haines v. Lake Shore & M. S. Ry. Co.* (Mich.), 1 R. R. R. 627, 24 Am. & Eng. R. Cas., N. S., 627; *Selma Street & Suburban Ry. Co. v. Owen* (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97; *Illinois Cent. R. Co. v. Ashline* (Ill.), 9 Am. & Eng. R. Cas., N. S., 702; *Baltimore, etc., Ry. Co. v. Peterson* (Ind.), 20 Am. & Eng. R. Cas., N. S., 887 (injury to employee); *Ward v. Illinois C. R. Co.* (Ky.), 18 Am. & Eng. R. Cas., N. S., 689 (injury to trespasser); *Harrison v. Sutter St. Ry. Co.* (Cal.), 8 Am. & Eng. R. Cas., N. S., 200; *Central of Georgia Ry. Co. v. Bond* (Ga.), 17 Am. & Eng. R. Cas., N. S., 757 (negligence per se); *Jackson v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 99 (must be proximate cause); *Knopf v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 172; *Cleveland, C., C. & St. L. Ry. Co. v. Tartt* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 226 (cannot be complained of by trespassers); *Jackson v. Kansas City, Ft. S. M. R. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 99 (negligence per se); *Chicago, etc., R. Co. v. Mochell* (Ill.), 23 Am. & Eng. R. Cas., N. S., 927; *Graney v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 8 Am. & Eng. R. Cas., N. S., 187; *Washington Southern Ry. Co. v. Lacey* (Va.), 6 Am. & Eng. R. Cas., N. S., 782; *Adams v. Southern Ry. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 747; *Western & A. R. Co. v. Stafford* (Ga.), 5 Am. & Eng. R. Cas., N. S., 172; *Chicago & A. R. Co. v. Winters* (Ill.), 12 Am. & Eng. R. Cas., N. S., 93 (negligence prima facie); *Barfield v. Southern Ry. Co.* (Ga.), 15 Am. & Eng. R. Cas., N. S., 735 (negligence per se); *Reidel v. Phila., W. & B. R. Co.* (Md.), 10 Am. & Eng. R. Cas., N. S., 91; *Overtom v. Chicago & E. I. R. Co.* (Ill.), 15 Am. & Eng. R. Cas., N. S., 849; *Highland, etc., Ry. Co. v. Sampson* (Ala.), 5 Am. & Eng. R. Cas., N. S., 720; notes, 11 Am. & Eng. R. Cas., N. S., 24 (injuries to employees); 2 Am. & Eng. R. Cas., N. S., 585; 8 Am. & Eng. R. Cas., N. S., 428; 19 Am. & Eng. R. Cas., N. S., 119.

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when they saw a person in such a position, to sound the alarm whistle, and the employees saw or could have seen the servant in time to avoid injury before running into him, defendant was guilty of negligence. Same.

If, as soon as those in charge of the engine saw that defendant was in a dangerous position, they did all they could to avoid injury, defendant was not guilty of negligence.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by Fred Smith against the Atlanta & Charlotte Air Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. F. Bason, for appellant.

Burwell & Cansler, for appellee.

CONNOR, J. The plaintiff, being in the employment of the lessee of the defendant, was, on the date of the injury complained of, sent to paint switch targets, and at the time of the injury was painting a target, the center of which was 4 feet from the center of the west rail of the defendant's track. The flange of the switch target extended from the center of the target toward the rail 6 inches. The engine extended over the track and towards the switch target as follows: Tender frame, 23½ inches; punch pole, 24 inches; the step between the engine and tender, 29 inches; and the cylinder, 26 inches. While engaged in painting the target, the plaintiff set his bucket, containing paint, down near the rail. A shifting engine and tender were passing back and forth over the tracks, and, just before this engine reached the point where the plaintiff was at work, he reached over to put his brush in the bucket, and was instantly stricken by the shifting engine, which was backing up towards him.

The plaintiff put in evidence certain rules of the defendant company, Rule W being: "Whenever any person, animal or other obstruction appears upon the track, or so close thereto, as to be in danger, then instantly the following precautions must be observed: First, the alarm whistle must be sounded; second, the brakes must be applied; third, every other possible means must be employed to stop the train and prevent the accident. If there is time, all of these requirements must be complied with. If by reason of the speed of the train, or the suddenness of the obstruction, only a part of these precautions can be observed, then such of them, as under the particular facts of each case are best calculated to prevent a possible accident, must be observed." "Rule 66. The unnecessary use of the whistle is prohibited. When necessary in shifting at stations and in yards, the engine bell shall be rung, and the whistle used only when required by rule or law or when necessary to prevent accident." "Rule 121. In all cases of doubt or uncertainty, take the safe course and run no risks." The plaintiff testified: That he was familiar with these rules,

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and that the switch engine was moving backward and forward in the yard of the defendant's tracks. That he went to work, and put his bucket right down beside the switch, and started to paint the target. Had been engaged in the work about 10 or 15 minutes when the engine came and knocked him down. That is the last he remembers. That he heard no bell ringing, or any whistle blown, or any warning of any kind given. That he was stricken about half an inch from the left temple on the forehead, going across the top of his head, and the bone on the left eye was broken or injured, and he was thrown on the right side of his shoulder, and was stricken across the breast, and suffered from his chest for a long time afterwards. Witness illustrated to the jury his position, and that of the target and of the engine. Said he was relying on the rules, of which he knew, for his protection. That it was impossible for him to do the work well, and at the same time keep a constant lookout for the movements of the engine. That, if he put his whole attention on the painting, he could not be on the lookout all the time. When he looked down, he looked both ways. Looked down, and did not see any engine. Thought he could get through painting before the engine came out of the coachyard, and, if it did come out, he expected it to ring the bell or blow the whistle to give him warning. It was necessary for him to keep his eye on the target while he was painting, because there were two colors. Had been employed by the defendant company for about three years. Says he did not hear the bell ring. That he put his bucket over next to the rail; illustrating the position in which he stood, and the point at which he put his bucket, by means of photographs offered in evidence. The track was pretty fair, level and straight. On redirect examination, plaintiff stated that, when he was doing this work in the manner he had shown the jury, he was relying upon the rules of the company and the ordinance of the city of Charlotte for his protection. Would not say that he had nothing else in mind. Thought, if the engine came, it would give some signal to get out of the way.

Plaintiff introduced Sherman Ludwick, who testified that he was a short block from where the plaintiff was painting. Saw him painting the target. When the train passed up the track and struck Mr. Smith, the witness heard them "holler." Saw the engine. Heard no bell ringing. No bell was ringing. Could have heard it if it had been. The train was running 25 or 30 miles an hour.

The plaintiff introduced Kerry Reynolds, who testified that he was about 100 feet from the plaintiff at the time of the injury. The train was running 30 miles an hour. He says he saw that the plaintiff was in danger, and "hollowed" at him twice to look out, and about that time it struck him.

Thomas Robinson, introduced by the plaintiff, says: That he was working 15 or 20 feet from the plaintiff. That the

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switch engine was coming from the depot with a sleeper, and when it went down the main line it came in the coach-yard. The witness was busy wiping off the coach. The plaintiff was painting. The last witness saw the plaintiff, the engine was as far as from "here to the middle of the street," and the witness heard Grant Wallace "hollow," "I think we have struck Mr. Smith." "I looked around at the engine, and saw Grant pull the bell cord, and saw the plaintiff. Did not hear bell ring until after the plaintiff was struck. Could have heard it ring. The train was moving 20 or 25 miles an hour. The engineer was on the opposite side from the plaintiff. Saw nobody on the left-hand side. The fireman did not seem to be in his place."

M. L. Harris, witness for the plaintiff, testified that the train was running 10 to 15 miles an hour. Heard no bell. Could have heard it if it had been ringing. Heard no whistle blow.

The defendant introduced the engineer, who testified: That he saw the plaintiff painting, and passed him several times—"I reckon, a dozen times;" that he was not in his way, and, if he had stayed where he was when the witness saw him, he was perfectly safe. He was perfectly safe where he was painting, as long as he stayed there. The tender obscured his view about 60 feet before he reached the plaintiff. Engine was backing. The bell was ringing. That he was about 400 feet from the plaintiff when he first saw him. If there had been any danger, could have stopped. A man could stand between the target and the rail and let an engine pass. "I have seen it done. No part of the engine struck him. It was the corner of the tender—what is called the 'pole socket.'"

The defendant introduced J. F. Boyd, who stated that he was painting targets on the morning of the injury, and that it required no skill to do so. Witness was about 100 feet from the plaintiff. Witness illustrated how he would paint a switch target without any danger to himself.

There were several other witnesses whose testimony tended to sustain the contentions of the plaintiff and the defendant.

The plaintiff offered in evidence section 299 of the ordinances of the city of Charlotte, prohibiting the running of trains at a greater rate of speed than four miles an hour in the corporate limits of the city. At the close of the plaintiff's testimony, the defendant made a motion to nonsuit, which was denied. At the close of the whole evidence, the motion to nonsuit was renewed and overruled, and the defendant excepted. We concur with his honor in his ruling upon this motion. There was evidence sufficient and competent to be submitted to the jury upon the issues raised by the pleadings. He submitted the following issues: "(1) Was the plaintiff injured by the negligence of the defendant's lessee, as alleged in the complaint? (2) Did the plaintiff by his own negli-

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gence contribute to his injury, as alleged? (3) If the plaintiff's negligence contributed to his injury, could the defendant's lessee, notwithstanding the said negligence of the plaintiff, have avoided the injury to him by the exercise of ordinary care? (4) What damages, if any, is the plaintiff entitled to recover?"

The defendant requested the court to charge the jury that, if they believed the evidence, the answer to the first issue must be "No." The instruction was refused, and the defendant excepted. There was no error in refusing this instruction.

The court stated the contentions of the parties, charged the jury at length, explaining to them the law applicable to the testimony, and charged them that if they found that there was an ordinance in force in the city of Charlotte forbidding the running of an engine in the corporate limits at a speed greater than four miles an hour, and the engineer was running at a greater rate of speed than four miles an hour within the corporate limits, in violation of the town ordinance, it would be evidence of negligence on the part of the defendant, to be considered by them in connection with the other testimony. He also instructed them that it was the duty of the defendant's engineer to ring the bell while moving his engine in the yard, and to use all proper and reasonable efforts to avoid injuring the servants of the defendant engaged in work on the yard. He also instructed the jury in regard to the duty of the engineer to observe the rules laid down by the defendant. We think his honor's instructions are fully sustained by the authorities prescribing the duty of the defendant under the circumstances testified to. In *Erickson v. Railroad* (Minn.) 43 N. W. 332, 5 L. R. A. 786, the plaintiff was lawfully at work as a section hand in close proximity to the defendant's track, where he was liable to be stricken by passing trains. It was held that, as the plaintiff occupied his position rightfully as an employee of the defendant, he was not required to look out for passing engines, as in case of trespassers and licensees, and that the company owed him the duty of "active vigilance" in giving proper signals and warnings of the approach of engines and trains, and that the plaintiff had the right to rely on the continued performance of this duty, without the necessity, while engrossed in his work, of keeping constant lookout for approaching trains. In *Schulz v. Railroad* (Minn.) 59 N. W. 192, the court held that, without regard to any custom or any rule of the company as to ringing the bell or giving other warnings, the defendant is required to give some signal of the approach of an engine, and that the failure to ring the bell or give warning was not a risk assumed by the plaintiff. In *Kelly v. Railroad* (Mo.) 8 S. W. 420, the plaintiff was an experienced track repairer, and was fastening a fish plate to a T-rail in the yard of the defendant at 12 o'clock in the day, and cars were frequently

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passing over the track where he was at work. A train was permitted to approach him without the ringing of the bell or other warning, and without having any one posted on the car to give proper signals. The plaintiff, being absorbed in his work, did not hear the noise of the train until he looked up, but too late to avoid being struck by the car. It was held that the plaintiff was lawfully and rightfully on the track, and if no person was placed on the car to give warning, or if, being placed there, he failed to warn the plaintiff, and no other signal was given, then the company was liable. "This rule," says the court, "is humane, conservative of human life, and consonant with public policy, and that when the person is lawfully and rightfully on the track, or in the way of passing trains, and apparently unmindful of approaching trains, the duty to give signals is imperative." In *Railroad v. Hinzie* (Tex.) 18 S. W. 681, the plaintiff was employed in painting a car on the defendant's track, and while engrossed in his work a switch engine, attached to cars, was moved onto this track without any signal or warning to the plaintiff, and he was injured. The court held that he was entitled to recover, and, after stating that it is the duty of the defendant to establish rules and regulations to warn workmen on its track, proceeded as follows: "It is true, also, that the cars would probably at any moment be switched on to the side track on which he was at work; but this would not necessarily, or even probably, import that he knew that the appellant would neglect to give him adequate warning of their approach, and that it was hence unsafe for him to perform the work in obedience to his orders. The mere fact that he knew that cars would probably be switched in upon the side track would not preclude a recovery by him, unless he also knew that it was unsafe to continue his labor; and this was a question for the jury." In *Felice v. Railroad* (Sup.) 43 N. Y. Supp. 922, it is said: "It is the duty of the master to use reasonable care to provide for the servant, so far as the work in which he is engaged will permit, a reasonably safe and proper place in which to do his work, and, to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard himself against them." In *Promer v. Railroad* (Wis.) 63 N. W. 90, 48 Am. St. Rep. 905, the court used the following language: "But the employee does not assume the risk of those dangers which are known by, or can be obviated or avoided by the exercise of reasonable care and caution on the part of, the company. The company is bound to take reasonable care and caution to protect those working in its yards from such dangers, and it would be liable for damages sustained by any employee in consequence of its neglect or

failure to discharge its duty in that regard. The duty is one arising from the relation of master and servant, and the servant has a right to assume, until he has knowledge to the contrary, that the master has taken and will adopt such reasonable measures as are within his power to protect him against such dangers while engaged in his work. The master is required to furnish the servant with a safe and proper place in which to perform his work, and while requiring the performance of work by a servant at a place which may or has become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger; that is to say, such as may be avoided by the exercise of reasonable care and caution on the part of the master."

The plaintiff swears that he knew the rule requiring the ringing of the bell, and that he was relying on that for his protection; that it was impossible for him to do the work well, and at the same time keep a constant lookout for the movements of the engine; that, if he put his whole attention on the painting, he could not be on the lookout all the time. There was evidence proper to be submitted to the jury that the bell was not ringing, and that the engine was moving at a dangerous rate of speed. We think there was ample evidence, if believed by the jury, to sustain their finding upon the first issue, and we find no error in the instruction to the jury as to the measure of duty which the defendant owed to the plaintiff.

The jury having found the second issue in favor of the defendant, it becomes unnecessary to examine the charge of the court in respect thereto.

His honor instructed the jury that the burden was on the plaintiff, upon the third issue, to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care, and if they found that the plaintiff had negligently placed himself in dangerous proximity to the defendant's track, and he was engaged in his work with his head down, and was unaware of the approach of the train, and if they further found that the defendant's rules required its agents in charge of its trains, whenever they saw a person in such position, to sound the alarm whistle, when necessary, and if they further found that the defendant's employee saw, or by the exercise of reasonable care could have seen, that the plaintiff was in a dangerous position in time to avoid injury, and ran the train on down the track without proper signal of the approach of the train, or stopping it, and that this was the proximate cause of the plaintiff's injury, they should answer the third issue "Yes"; that the defendant contended that the plaintiff was not in a dangerous position until a second before the train struck him,

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passing over the track where he was at work. A train was permitted to approach him without the ringing of the bell or other warning, and without having any one posted on the car to give proper signals. The plaintiff, being absorbed in his work, did not hear the noise of the train until he looked up, but too late to avoid being struck by the car. It was held that the plaintiff was lawfully and rightfully on the track, and if no person was placed on the car to give warning, or if, being placed there, he failed to warn the plaintiff, and no other signal was given, then the company was liable. "This rule," says the court, "is humane, conservative of human life, and consonant with public policy, and that when the person is lawfully and rightfully on the track, or in the way of passing trains, and apparently unmindful of approaching trains, the duty to give signals is imperative." In *Railroad v. Hinzie* (Tex.) 18 S. W. 681, the plaintiff was employed in painting a car on the defendant's track, and while engrossed in his work a switch engine, attached to cars, was moved onto this track without any signal or warning to the plaintiff, and he was injured. The court held that he was entitled to recover, and, after stating that it is the duty of the defendant to establish rules and regulations to warn workmen on its track, proceeded as follows: "It is true, also, that the cars would probably at any moment be switched on to the side track on which he was at work; but this would not necessarily, or even probably, import that he knew that the appellant would neglect to give him adequate warning of their approach, and that it was hence unsafe for him to perform the work in obedience to his orders. The mere fact that he knew that cars would probably be switched in upon the side track would not preclude a recovery by him, unless he also knew that it was unsafe to continue his labor; and this was a question for the jury." In *Felice v. Railroad* (Sup.) 43 N. Y. Supp. 922, it is said: "It is the duty of the master to use reasonable care to provide for the servant, so far as the work in which he is engaged will permit, a reasonably safe and proper place in which to do his work, and, to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard himself against them." In *Promer v. Railroad* (Wis.) 63 N. W. 90, 48 Am. St. Rep. 905, the court used the following language: "But the employee does not assume the risk of those dangers which are known by, or can be obviated or avoided by the exercise of reasonable care and caution on the part of, the company. The company is bound to take reasonable care and caution to protect those working in its yards from such dangers, and it would be liable for damages sustained by any employee in consequence of its neglect or

failure to discharge its duty in that regard. The duty is one arising from the relation of master and servant, and the servant has a right to assume, until he has knowledge to the contrary, that the master has taken and will adopt such reasonable measures as are within his power to protect him against such dangers while engaged in his work. The master is required to furnish the servant with a safe and proper place in which to perform his work, and while requiring the performance of work by a servant at a place which may or has become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger; that is to say, such as may be avoided by the exercise of reasonable care and caution on the part of the master."

The plaintiff swears that he knew the rule requiring the ringing of the bell, and that he was relying on that for his protection; that it was impossible for him to do the work well, and at the same time keep a constant lookout for the movements of the engine; that, if he put his whole attention on the painting, he could not be on the lookout all the time. There was evidence proper to be submitted to the jury that the bell was not ringing, and that the engine was moving at a dangerous rate of speed. We think there was ample evidence, if believed by the jury, to sustain their finding upon the first issue, and we find no error in the instruction to the jury as to the measure of duty which the defendant owed to the plaintiff.

The jury having found the second issue in favor of the defendant, it becomes unnecessary to examine the charge of the court in respect thereto.

His honor instructed the jury that the burden was on the plaintiff, upon the third issue, to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care, and if they found that the plaintiff had negligently placed himself in dangerous proximity to the defendant's track, and he was engaged in his work with his head down, and was unaware of the approach of the train, and if they further found that the defendant's rules required its agents in charge of its trains, whenever they saw a person in such position, to sound the alarm whistle, when necessary, and if they further found that the defendant's employee saw, or by the exercise of reasonable care could have seen, that the plaintiff was in a dangerous position in time to avoid injury, and ran the train on down the track without proper signal of the approach of the train, or stopping it, and that this was the proximate cause of the plaintiff's injury, they should answer the third issue "Yes"; that the defendant contended that the plaintiff was not in a dangerous position until a second before the train struck him,

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and that, after the defendant company discovered that he was in a dangerous position, they did all they could to avoid the injury, and that it was impossible for them to avoid it; that as soon as he placed himself in that dangerous position, warning was given, and the brakes applied at the same instant he was struck; that if they found from the evidence that the plaintiff was in a place of safety up to the time he leaned over to get paint on his brush, and if they found that he did this, and it took him less than a second, and that he was stricken instantly upon leaning over, they would answer this issue "No," but it was the duty of the plaintiff to establish his contention as to this issue by a preponderance of the evidence. There was no exception to this charge, and we think that there was evidence to be submitted to the jury to sustain that finding. Upon a careful examination of the entire record, we think that his honor's instructions are sustained by both authority and reason. See, also, *McLamb v. Railroad*, 122 N. C. 875, 29 S. E. 894; *Andreson v. Railroad (Utah)* 30 Pac. 305; *Beach on Cont. Neg. (Ed. 1899) § 67.* Judgment affirmed.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

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(*Supreme Court of Illinois, April 24, 1903.*)

[67 N. E. Rep. 376.]

Accident on Track—Care Due Licensee and Trespasser.

A railroad company owes no duty to a person walking along its tracks without its invitation, either expressed or implied, except to refrain from wantonly or willfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it makes no difference in that respect whether he is a trespasser, a mere licensee, or one who is on the track by mere sufferance, without objection of the company.

Same—Licensees—Use of Track by Pedestrians without Objection.

Where a railroad ballasted its tracks within switch limits so as to prevent injury to its employees, and made no objection to the use by the public of the pathway formed by the ballast, the railroad could not be considered as inviting the public to use the pathway, but persons using it were mere licensees.

Same—Injury to Licensee—Negligence—Speed.

Mere negligence in running a train faster than allowed by ordinance is not sufficient to entitle a licensee to recover for injuries caused by the excessive speed.

Same—Same—Willfulness or Wantonness—Sufficiency of Evidence.

Where deceased, a licensee on a railroad right of way, was walking between the tracks, beyond the reach of passing trains, and varied his course towards a track on which a train was approaching only when the train was within 100 feet, and the engineer's view was obscured by the front of the engine, there was nothing tending to show willful or wanton injury, making the railroad company liable for his injuries.

Same—Liability for Injury to Licensees—Pleading—Instructions.

Where a declaration in an action against a railroad company for

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causing the death of a licensee on the right of way charged mere negligence, and instructions given at plaintiff's request authorized a recovery on proof of the facts alleged, the fact that instructions were given at defendant's request requiring proof of willful or wanton injury did not cure the error.

Gross Negligence—Speed in Violation of Ordinance.*

Running a train at a speed prohibited by ordinance is not of itself gross negligence.

Magruder, C. J., dissenting.

Appeal from Appellate Court, Fourth District.

Action by Mary Eicher against the Illinois Central Railroad Company. From a judgment of the Appellate Court (100 Ill. App. 599) affirming a judgment for plaintiff, defendant appeals. Reversed.

W. W. Barr (J. M. Dickinson, of counsel), for appellant.
William A. Schwartz and Andrew S. Caldwell, for appellee.

CARTWRIGHT, J. Ben Eicher, husband of appellee, was struck by the pilot beam of an engine of appellant while he was walking on its right of way between the railroad tracks in the city of Carbondale on July 23, 1901, and was killed. Appellee was appointed administratrix of his estate, and brought this suit to recover damages resulting from his death. There were two counts in the declaration, in each of which it was averred that there was a cinder path between the double tracks of defendant's railroad, used by its employees and other persons as a walk, and that deceased was walking along said cinder path in the exercise of due care and caution for his own safety, and was killed by the negligent operation of the engine and train. Both counts charged negligence generally in the management of the engine and train, and in addition thereto the second count averred that the cinder path was generally used, and was a smoother road for pedestrians and a better walk than the public road alongside the right of way on the west; that there was an ordinance of the city limiting the speed of passenger trains to ten miles per hour; that the passenger train, which was known as the "Fast Mail," was running at a higher rate of speed than was permitted by the ordinance; that the deceased, while walking along the main track, hearing the whistle of the engine, looked back, and stepped from the main track to the cinder path; and that he was struck and killed by the engine by reason of defendant's negligence. The defendant pleaded the general issue, and upon a trial there was a verdict for \$2,500, on which judgment was entered. The Appellate Court for the Fourth District affirmed the judgment.

At the conclusion of all the evidence, the defendant moved the court to direct a verdict in its favor, and presented an instruction for that purpose, which the court refused to give.

*As to whether the violation of an ordinance limiting speed is negligence, see foot-note appended to preceding case.

The refusal is assigned as error, and the assignment raises the question whether there was evidence which, as a matter of law, fairly tended to prove the cause of action.

The accident was witnessed by several persons, including the postal clerk on the train, and a switch hand standing on the tracks, who were called as witnesses by the plaintiff. The evidence on the part of the plaintiff, and all the evidence produced at the trial tending in any degree to prove the allegations of the declaration or sustain a cause of action, tended to prove the following facts: Something over half a mile north of defendant's depot and the public square in the city of Carbondale there is a switch tower and a railroad crossing, and from that point south there are double main tracks. South-bound passenger trains take the west track, and north-bound trains the east track. Between these two main tracks, from the switch tower to the depot and public square, there is a space a little over 10 feet wide, filled level with the tops of the ties with cinders and ballast, making a smooth, even walk and path, which is traveled and used by defendant's employees and others quite generally, both for business and pleasure. Persons who have occasion to go that way use the path, and people are accustomed to walk out along the path on Sundays for recreation. There is a public road adjoining the right of way on the west, leading into the public square at Carbondale, but the path between the tracks makes a better walk, especially in muddy weather. Between the tower and the depot there are junctions of branch lines or divisions with the main line, and there are also side tracks in addition to the two main tracks. At the time of the accident the fast mail train due at Carbondale at 11:20 a. m. was approaching from the north. The day was clear, and the weather very warm. There was nothing to obstruct the view of the train, or the view from the train of any person on the track. The deceased was walking from the north between the main tracks toward the public square and depot. The train whistled north of the switch tower, and at that point took the west track. As the train approached, the deceased was a short distance north of a switch stand which was a little over 700 feet north of the depot. The train was running about 15 miles an hour, and there was an ordinance limiting the speed of passenger trains within the city to 10 miles an hour. Until the train was close to him, the deceased was walking in the center between the two tracks, and was entirely out of danger. The engineer was on the right side of the cab, in his place, and the head of the engine cut off his view of the deceased about 125 feet before reaching him. As the train approached, the deceased veered toward the track the train was on, and just before he was struck was seen by the postal clerk, a switch hand, and another witness to be in a position of danger. The judgment of the postal clerk, in his testimony, for the plaintiff, was that the train was within 100 feet

of the deceased when it was plain to be seen that he was going toward the track, and that he was within 4 or 5 feet of the engine when it seemed as though he was close enough to be struck by it. Plaintiff's witnesses differed somewhat in their opinions as to the distance from the train when he came close enough to the track to be struck by the engine, but they agreed that it was a very short distance. The switch hand testified that at the time the deceased was struck he was wiping the sweat off from his face; that he took a handkerchief out of his right-hand hip pocket and wiped off the sweat just as he was struck. The witness beckoned to him to get away from the track, and also called to him, but could not make him hear. The pilot beam extended over the rail 16 or 18 inches—about as far as the ends of the ties. No signal was given, and the speed of the train was not checked.

A railroad company owes no duty to a person walking along its tracks without its invitation, either expressed or implied, except to refrain from wantonly or willfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it makes no difference in that respect whether he is a trespasser, a mere licensee, or one who is on the tracks by mere sufferance, without objection of the company. One who goes upon a railroad track by permission, or where permission may be implied from the circumstances, may be regarded as having a license, but one who is there by mere sufferance is not a licensee, and may be a trespasser. In either case there is no duty toward him, except to refrain from wantonly or willfully injuring him. *Illinois Central Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Lake Shore & Michigan Southern Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; *Illinois Central Railroad Co. v. Noble*, 142 Ill. 578, 32 N. E. 684; *Wabash Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Illinois Central Railroad Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098. In *Illinois Central Railroad Co. v. Godfrey*, *supra*, no distinction was made between a licensee and a trespasser, but the same rule was applied to both, and it was said: "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident." One who has permission or license to travel along the tracks takes it subject to the use of the road without reference to him. The license imposes no obligation to take precautions for his safety, or to run trains in any respect different from what they would be run if he was not there. He takes the premises as he finds them, with all the attendant dangers connected with their use, only subject to the limitation that the company shall not inflict upon him wanton or intentional injury. 2 Thompson on Negligence, § 1713. It has been said that railroad companies are engaged in the performance of public duties, and represent the right

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and interest of the public in cheap, safe, and rapid transit; and if they owed a duty to run their trains with reference to trespassers or licensees, to look out for them, to slacken speed, and perhaps to stop, wherever they have reason to expect them, the public would suffer, and the public duty would not be discharged. 3 Elliott on Railroads, § 1250; 2 Thompson on Negligence, § 1705. And in *Illinois Central Railroad Co. v. Hetherington*, 83 Ill. 510, the court said: "The safety of the traveling public demands that the right of way of a railroad company should be unobstructed." A railroad company has no right to disregard its obligations to the traveling public, or disable itself from their full performance.

The rights of trespassers and mere licensees are entirely different from the rights of those who come upon the premises of a railroad company for a purpose connected with its business, where the invitation and the mutual interest raise a duty toward them. An invitation to come upon the premises at proper places for the purposes of business may be implied, but in this case the deceased was not upon the premises of the defendant for any such purpose. There is no controversy whatever over the fact that he was walking upon this path merely for his convenience, and that he was either a trespasser or there by sufferance, or, at most, there was a mere license to the public, arising out of the fact that defendant had made no objection to the use made of the walk. All that was proved was that the space between the two main tracks was filled with cinders and ballast level with the tops of the ties, so as to be smooth and firm, making a better way for walking than the public road adjoining, and that it was used by the employees of the defendant and the public without objection. The fact that the space was so filled had no tendency to prove an invitation to the public to use the footpath, or that it was prepared for public use. It would be a wholly unwarranted assumption to say that defendant made the pathway for public use, and invited the public into a place of danger, for no benefit or advantage to itself, and for no purpose in connection with its business, merely because it did not forbid the use of the path. The place was used by employees of the defendant, and was within its switchyards. It was its duty to use reasonable care to provide a safe and suitable place for its employees to work. Railroad tracks within switch limits must be ballasted so as to render them reasonably safe for the use of employees in the performance of their duties, and an employer might be held liable for a failure to use such reasonable care. *Lake Erie & Western Railroad Co. v. Morrissey*, 177 Ill. 376, 52 N. E. 299. Defendant might be liable for a failure to perform that duty, and the fact that it did perform it is no evidence of an invitation to the public. The failure to object to the use did not amount to an invitation to the public to come upon its tracks and expose themselves to danger, or impose an obligation to run

trains in any respect different from what they would be run if there were no such use. Defendant would not be justified in willfully or wantonly injuring a person upon the track; and in *Wabash Railroad Co. v. Jones*, supra, where the second and third counts charged that the engineer saw the plaintiff, and recklessly and wantonly ran over him, we held that the plaintiff would have a right to recover for an injury so alleged, regardless of the question whether the engineer had reason to suppose that some person might be using the track as a path. In this case, however, there was no evidence tending to show a willful or wanton injury, or that the defendant did not use reasonable care to avoid injuring the deceased after he was seen to be in a position of danger. The evidence introduced by plaintiff proved beyond question that the deceased was in perfect safety until the engine was so near to him that it could not have been stopped by any kind of effort that might have been made, even if not running faster than 10 miles an hour, and that he veered toward the track, into a position of danger, after the view of him was entirely cut off from the engineer by the front of the engine.

It is argued that inasmuch as the train was running faster than 10 miles an hour, as limited by the ordinance, there was a presumption of negligence on the part of the defendant, which would constitute a cause of action. It is true that such fact does raise a presumption of negligence, but it is negligence merely, which, as we have already seen, would not justify a recovery. In *Illinois Central Railroad Co. v. Hetherington*, supra, where a train was running at the rate of 15 miles an hour, in violation of an ordinance, it was held that the speed of the train could not, alone, be regarded as a sufficient reason for holding that the injury was willful or wanton; and the language there used was quoted and approved in *Blanchard v. Lake Shore & Michigan Southern Railway Co.*, 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630. The evidence did not tend to prove such conduct on the part of those in charge of the train as would create a liability against defendant.

The declaration alleged that the deceased was upon defendant's right of way, and did not show that he was rightfully there, by invitation or otherwise, and charged mere negligence on the part of the defendant. Instructions given at the request of the plaintiff authorized a recovery upon proof of the negligence charged in the declaration, and they were not in accordance with the law. It is urged that the case was tried and submitted to the jury on the part of the defendant upon the question of willful or wanton injury, and therefore it cannot complain of the reference to the declaration. It is true that, after the refusal of the court to direct a verdict, general instructions were asked by the defendant, and given, requiring proof of a willful or wanton injury; but these could not remedy the effect of the instructions authorizing a verdict of

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guilty upon proof of mere negligence. The instructions are in irreconcilable conflict, and do not present any harmonious view of the law. While it has not been deemed cause for reversal that the jury have been referred to the declaration where they would not be misled by the instructions, the admitted facts in this case were such that a recovery could not be had upon proof of the negligence charged in the declaration. There was one instruction telling the jury that if the deceased was not a trespasser on the right of way, and was exercising ordinary care, and the defendant was guilty of the negligence charged in the declaration, causing his death, they should find the defendant guilty. There were two instructions to the like effect in case the jury believed that the defendant was guilty of the negligence charged in the second count of the declaration. Although the jury might believe that the deceased was not a trespasser, but was exercising the right of a mere licensee, or was on the track by sufferance of the defendant, there could be no recovery on account of negligence charged in the declaration. An instruction given at the instance of the plaintiff advised the jury that it was gross negligence on the part of defendant to run its trains through a town at a rate of speed prohibited by an ordinance. While the circumstances of a particular case, such as a high rate of speed and the presence of a number of people, may be evidence of gross negligence, it is not a rule of law that negligence in running a train at a rate of speed prohibited by an ordinance is gross. The error in giving these instructions was not cured by any instructions given on the part of the defendant.

The judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

MAGRUDER, C. J. (dissenting). 1. It is assigned as error by the appellant that the court below refused to give the peremptory instruction, asked for by the appellant, to find it not guilty. This assignment of error involves the question whether or not there was evidence tending to support the cause of action set up in the declaration.

Does the testimony tend to support the charge that the appellant was guilty of negligence which caused the injury to appellee's intestate? The second count of the declaration set up in hæc verba an ordinance of the city of Carbondale, which provided as follows, to wit: "Section 1. It shall be unlawful for any railroad company or conductor or engineer, agent or other such employee of such railroad company, or other person managing or controlling any locomotive engine, car or train upon any railroad track, to drive, run or propel, within the limits of this city, any passenger train or car, at a greater rate of speed than ten miles per hour, or any freight train or car at a greater speed than six miles per hour; nor in any manner to obstruct the travel or passage along any side-

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walk, street or alley of said city, by placing or leaving upon, or across such sidewalk, street or alley, any truck, locomotive, car or train of cars, or material or thing whatsoever, for a longer period than five minutes at any time, and immediately thereafter for the full period of five minutes such sidewalk, street or alley shall not again be obstructed in the manner aforesaid, under the penalty of not less than \$5.00 nor more than \$25.00 for each and every offense." This ordinance was introduced in evidence by the appellee upon the trial.

Section 24 of the act of 1874 in regard to fencing and operating railroads provides as follows: "Whenever any railroad corporation shall by itself or agents run any train, locomotive engine or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive, engine, or car; and the same shall be presumed to have been done by the negligence of the said corporation, or their agents: * * * provided, that no such ordinance shall limit the rate of speed, in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour." 3 Starr & C. Ann. St. (2d Ed.) pp. 3279, 3280, c. 114, par. 93. Under this statute an injury done to person or property in consequence of running a train beyond the speed limited by ordinance in an incorporated city, town, or village must be presumed to have been inflicted by the negligence of the railroad company, or its agents operating such trains. The presumption of negligence in such case is not conclusive, but is a prima facie one. That is to say, where the injury and the violation of the ordinance are proved, a prima facie case of negligence is made out against the company, and the onus is thereby thrown upon it to rebut the presumption of law arising upon the facts proved. Toledo, Peoria & Warsaw Railway Co. v. Deacon, 63 Ill. 91; Chicago, Burlington & Quincy Railroad Co. v. Haggerty, 67 Ill. 113; Illinois Central Railroad Co. v. Ashline, 171 Ill. 313, 49 N. E. 521; Atchison, Topeka & Santa Fe Railroad Co. v. Feehan, 47 Ill. App. 66.

In the case at bar the proof shows that the passenger train which struck and killed appellee's intestate was traveling within the limits of the city, and at the point where the accident occurred, at the rate of 15 miles per hour. Indeed, one of the witnesses testifies that it was traveling at the rate of 20 miles per hour, although some of the witnesses of appellant put the rate as low as 12 miles per hour. But the evidence is conclusive that the train was traveling faster than 10 miles per hour, which was the limit fixed by the city ordinance. There was a prima facie presumption, therefore, that the appellant was guilty of negligence. Whether or not the

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evidence introduced by appellant rebutted the prima facie presumption thus arising was a matter for the determination of the jury. The fact that a presumption of negligence existed, and that such presumption would prevail unless overcome by rebutting testimony, showed that there was proof tending to establish the charge of negligence against the appellant.

The next question is whether the evidence in the case tended to sustain the allegation in the declaration that the appellee's intestate was in the exercise of due care and caution for his own safety at the time when he received the injuries which caused his death. The ground upon which it is claimed by the appellant that the deceased was not in the exercise of due care and caution is that he was a trespasser upon the right of way of the appellant company. The doctrine is invoked by the appellant that a railroad company, in the operation of its train, owes no duty to a trespasser on its right of way or tracks, except that it will not wantonly or willfully inflict injury upon him.

The proof shows that upon the right of way of the appellant company, for some distance north of its depot and of the public square in the city, there were two tracks. Passenger trains coming from the north and going south passed over the track to the west, and passenger trains coming from the south and going north passed over the east track. Between these tracks was a space some 10 feet and several inches wide. This space was filled with cinders and slag, made into a walk for the passage of the employees of the railroad company, and, it would appear, of the public generally. The depot of the appellant was on the public square, and the walk in question between the tracks extended up to the public square and to the depot, and past the depot. This walk had for years been permitted by the railroad company to be used as a means of approach from the north to its depot and to the public square. A witness named Toler, engaged in the railroad mail service of the appellant company, testified as follows in regard to this trackway or path: "It is a cinder path. That path is used by the railroad men and the public. All my life I have noticed people travel on that railroad track. Well, if a person has any business in that part of town, especially if they are in a hurry, I always take the railroad track, and I have noticed a good many other people that way. I have traveled it myself. I think this cinder path extends up into Carbondale to the public square. As I remember, this cinder path is straight from the public square to the junction, north."

A witness named Wilkins testified as follows: "The trackway between the two tracks down that way is filled up with cinders, making it a level walk. I worked at the Illinois Central yards last July. I am not working there now. This cinder walk was used by everybody that I saw walking down

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that way. That trackway would extend up to the public square—up to the depot, and past the depot. The depot in Carbondale is right on the public square. * * * It is a good, solid walk; a level nice walk. * * * I always traveled that way to my work. * * * The place between the two tracks is perfectly level. It is leveled up by the cinders. It is leveled up to the bottom of the rail next to the ties."

A witness named Kimmel, general manager of the ice-plant manufacturing establishment, testified as follows: "The right of way between the main tracks from the public square down to the junction is composed of cinders and ballast. It is packed by constant use; persons traveling; pedestrians. The public used to go that way when they would have business up there. Also folks would travel that way on Sundays, to see the sights and take a walk. The people that live north travel that way. They had no walks." This witness also states that there was no fence along the right of way at that point; that there were some posts there, but no wire; that there had been one or two wires, but that they had been cut down, and that, although there had been a fence there, the wires were broken down from the public square up to the junction; and that such had been its condition for several years.

One McLoid, a witness for the defendant, and the locomotive engineer in charge of the engine that struck the deceased, testified as follows: "It is a very common thing for me to see people walking between those tracks. There is about fifteen feet between those tracks, from center to center. There was plenty of room between the two tracks for persons to pass safely a train running on either track. It must be ten and a half feet between the rails. Fifteen feet from center of the north-bound track to the center of the other track. It is ten and a half feet between the rails of the two tracks. The pilot beam extends out over the rail in the neighborhood of sixteen or eighteen inches. * * * It is between the two main tracks, and is graded up with cinders. * * * There is constantly people along the road there. The public use it. I know that, and I knew it at the time, and had known it for some time."

A witness named Conway, the fireman on the train which struck the deceased, testified as follows: "It was a frequent occurrence to see men walking there between the tracks as I saw Mr. Eicher. * * * I suppose it is about fourteen feet between the two tracks from rail to rail—the closest rails." A witness named Ray testifies that the distance between the west rail of the north-bound track to the east rail of the south-bound track was about 10 feet and 2½ inches.

It thus appears from the testimony that the walk in question had been used for years by the public as an approach to the depot and public square with the consent and by permis-

sion of the railroad company. If the evidence showed that there was nothing more in the facts of the present case than a supposed implied assent of the company to the use of the walk between the tracks by the public from its noninterference with a prevailing practice of that kind by individuals, it might be said that the deceased was a wrongdoer and trespasser in walking upon the right of way of the company. But there was here something more than a mere naked license or permission to enter upon the right of way of the company. By building up the walk between the tracks to the level of the rails, and making the cinders and slag firm and strong, so as to constitute a passageway, the company virtually invited the public to enter upon their property, especially as the walk in question was used as an approach not only to the public square, but to the company's depot. There is a distinction between cases where the owner grants a mere naked license or permission to enter upon or pass over an estate, and cases where such owner holds out any invitation, allurements, or inducement to persons to enter upon or pass over his property. "A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability, but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Sweeney v. Old Colony & Newport Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Lake Shore & Michigan Southern Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. The proof in the case at bar shows that there was here not a mere passive acquiescence in the use of this path by the public, but that the company, in view of its conduct in reference to the same, induced persons to enter upon and pass over it. It cannot be said that the deceased was a trespasser upon the right of way of the appellant company, because he was there, either directly or by implication, through the invitation of the company. The facts thus referred to distinguish the case at bar from the case of *Illinois Central Railroad Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098, and the cases therein referred to and commented upon.

In *O'Connor's Case*, *supra*, it is said that there was no evidence to the effect that any of the employees of the company in charge of the train saw or had actual notice of the fact that the person upon whom the injury was inflicted was on the track or right of way. Here, however, the evidence shows that the engineer and the fireman both saw the deceased upon the right of way before the train reached the point where he was walking, and that no steps were taken to slacken the speed of the train. In *O'Connor's Case*, *supra*, it was said (page 566, 189 Ill., page 1100, 59 N. E.), quoting from Elliott in his work on Railroads: "Mere sufferance or pas-

sive acquiescence in the occasional use of the track between crossings does not necessarily amount to a license, and, where nothing more is shown, one who so uses the track is a trespasser." In the present case something more than mere sufferance or passive acquiescence in the occasional use of the path in question is shown. Nor is there any evidence, so far as I have been able to discover, tending to show that the deceased was not in the exercise of due care for his own safety, because the locomotive engineer and the fireman upon the train which struck him state that when they saw him he was in the middle of the passageway in question.

In view of what has been said, I concur in the following views expressed by the Appellate Court in their decision of this case: "It is at least a proper inference from the evidence that the appellant owned the strip of ground between the two parallel lines of railroad track upon which deceased was walking, but it had suffered the same to become and be in general use by the public as a walk or way. While it may be that the deceased was there by mere permission, he was in no sense a trespasser. * * * The question of whether deceased was exercising ordinary care was a question of fact for the jury. It cannot be contended that the mere act of walking along that public, traveled way, was a failure to exercise ordinary care, for it was not in violation of any law, nor was it a trespass; and the evidence conclusively proves that such was the ordinary conduct of the inhabitants of the city of Carbondale and vicinity. It is clear from the evidence that deceased neither saw nor heard the approaching train, and that no effort was made by those in charge of the train to attract his attention. We do not feel warranted in holding that failure to see or hear the train under such circumstances takes the question as to due care out of the domain of fact, and makes it a question of law."

2. Some objections are made to the instructions given by the trial court on behalf of the appellee. Two of these instructions are objected to upon the ground that they refer to "the negligence charged in the declaration." Instructions thus referring to the allegations in the declaration have been approved in a number of cases, and consequently the objection thus urged is without force. *Chicago & Alton Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, and cases there referred to. Objection is made to some of the instructions upon the ground that they apply to the deceased, at the time of the injury to him, the benefit of the provisions of the statute and ordinance in regard to the rate of speed to be observed by passenger trains passing through the limits of the city. The objections thus made proceed upon the theory that the deceased was a trespasser. The contention of the appellant is that the passage of the train at a rate of speed greater than that permitted by the city ordinance could only be considered as a circumstance showing negligence on the part of the com-

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pany in case the deceased had been lawfully upon the right of way. *Illinois Central Railroad Co. v. O'Connor*, supra. But in view of the evidence already commented upon, tending to show that he was not a trespasser, but was upon the right of way by the invitation of the company itself, the objections thus made are without force.

One or more of the instructions are also objected to as referring to the jury the question whether or not the deceased was a trespasser upon the right of way of the appellant company. In *Chicago, Burlington & Quincy Railroad Co. v. Murowski*, 179 Ill. 77, 53 N. E. 572, we said (page 82, 179 Ill., page 574, 53 N. E.): "Under the facts as they appeared from the evidence, it was a question for the jury to determine whether plaintiff was a trespasser, or whether he was rightfully on defendant's property, at the time he was injured." So, under the facts appearing from the evidence in this case, I think that it was a question for the jury to determine whether the deceased was a trespasser, or was rightfully upon the right of way of the appellant company. Consequently there was no error in the instructions in this regard.

Some objection, also, is made to an instruction given on behalf of the appellee in regard to the damages to be awarded to the appellee. This instruction is objected to as containing the following language: "The jury may give plaintiff such damages as they shall deem from the evidence a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of said deceased, if any, not exceeding the sum of \$5,000." The proof shows that the appellee's intestate was a farmer, and, as an employee of the owner of a small farm, was paid \$20 a month for his services in running the farm. He left a widow and four young children. The language objected to in this instruction follows almost verbatim the language of paragraph 2 of chapter 70 of *Starr & Curtis' Annotated Statutes* in regard to injuries to the person. The last clause of that section is as follows: "And in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000.00." 2 *Starr & C. Ann. St.* (2d Ed.) p. 2156, c. 70, par. 2. The instruction is not objectionable in the respect thus indicated.

3. Even if the deceased was upon the right of way of the appellant company as a trespasser, it was the duty of the servants of the appellant employed in the management of the train to avoid the infliction of any injury wantonly or willfully upon the deceased. In other words, if the appellant company, or any of its servants, were guilty of wanton and willful negligence, the company is liable to the appellee, even if the deceased was a trespasser upon the right of way.

Upon this subject we concur in the following views expressed by the Appellate Court in their opinion deciding this case: "Appellant's counsel tried the case in the circuit court on the theory that deceased was a trespasser, and that to warrant a recovery the evidence must prove wantonness or willfulness on the part of appellant. The circuit court agreed with counsel in this theory of the case, and, at counsel's instance and request, instructed the jury over and over again that, if deceased was walking on the right of way of the railroad company, then he was a trespasser, and there could be no recovery, unless such negligence is proven as amounts to wantonness or willfulness. One of the forms in which it was put to the jury is: 'He [she] cannot recover unless it is shown that the agents of defendant in charge of the train striking him deliberately and wantonly, after they knew of his presence in the place of danger, ran the train against him. That merely negligently doing so is not enough. That it must be deliberately and wantonly done before he [she] can recover.' Appellant's counsel presented this issue of fact directly to the jury upon the evidence before them, and the jury resolved the issue against the appellant, and were warranted in doing so. The running of a train through a city or village at a rate of speed prohibited by ordinance may be, and often is, negligence so gross as to amount to a reckless, willful, and wanton disregard of human life. *Chicago, Burlington & Quincy Railroad Co. v. Johnson*, 53 Ill. App. 478." In addition to the instruction referred to in the opinion by the Appellate Court, the appellant, upon the trial below, asked for, and succeeded in obtaining from the court, an instruction containing the following words: "Before you can give a verdict for the plaintiff here, it must appear from the evidence, if it is shown that the deceased, when struck, was on the right of way of defendant, that the trainmen, after they saw the deceased was in a place of danger, wantonly and willfully ran the train against him. If the evidence fails to show this, then your verdict should be for the defendant."

Counsel for appellant say that the question whether or not there was wanton and willful negligence should not have been left to the jury, because there was no allegation in the declaration charging wanton or willful negligence. It must be observed, however, that the appellant itself submitted the question to the jury by its own instructions, and therefore cannot complain; there have been certain circumstances in the evidence tending to support the charge of wanton and willful negligence. It has been held by this court that, when facts proven are not within the allegations of the pleadings, neither party can complain if each procures instructions declaring the rules of law applicable to the facts shown by the testimony, regardless of the issues made by the pleadings, and asks a verdict in accordance therewith. *Illinois Steel*

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Co. v. Novak, 184 Ill. 501, 56 N. E. 966; *Chicago & Alton Railroad Co. v. Harrington*, *supra*.

I can see no good reason for reversing the judgments of the lower courts, and think that the judgment of the Appellate Court, affirming the judgment of the circuit court, ought to be affirmed.

MITCHELL *v.* ILLINOIS CENT. R. CO.

(*Supreme Court of Louisiana, April 13, 1903.*)

[34 So. Rep. 714.]

Running Switch—Gross Negligence.

Under the circumstances of this case, the making of what is called a "running switch," is held gross negligence.

Same—Proximate Cause of Accident.

While the running switch was the remote cause of the accident, a direct and approximate cause is found in the failure of the brakeman, who was sent to a public and much used street crossing over which the running switch had to be made, to give the warning he was sent there to give.

Concurrence of Remote and Proximate Causes.

The two together suffice to fix the liability of the defendant, unless contributory negligence of a character to defeat recovering supervenes.

Contributory Negligence—Care Required of Boy for Self-Protection. *

While a boy of twelve years of age may be guilty of contributory negligence which bars recovery, he is not to be held to the same degree of care, prudence and circumspection that a full grown person is.

Same.

A case like the present one, where a railroad company is engaged in the performance of a hazardous undertaking without using proper precautions to safe-guard the public, is to be differentiated from one where a person is injured by his failure to observe necessary precautions against the ordinary and usual dangers to be anticipated at a railroad crossing.

Breaux, J., dissenting.
(Syllabus by the Court.)

*As to the degree of care required of children for their own protection, see foot-note appended to *Anderson v. Central R. Co. of New Jersey* (N. J.), 7 R. R. R. 51, 30 Am. & Eng. R. Cas., N. S., 51; *Wilson v. Atchison, etc., Ry. Co.* (Kan.), 6 R. R. R. 664, 29 Am. & Eng. R. Cas., N. S., 664; *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Tex.), 3 R. R. R. 608, 26 Am. & Eng. R. Cas., N. S., 608 (boy eleven years of age); *Benedict v. Minneapolis & St. L. R. Co.* (Minn.), 3 R. R. R. 701, 26 Am. & Eng. R. Cas., N. S., 701 (boy sixteen years of age); *Citizens' St. R. Co. v. Hamer* (Ind.), 2 R. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9; *Edgington v. Burlington, C. R. & N. Ry. Co.* (Iowa), 4 R. R. R. 249, 27 Am. & Eng. R. Cas., N. S., 249 (child seven years old too young to apprehend danger from turntable); *Chicago City Ry. Co. v. Twohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1 (child under seven years of age incapable of contributory negligence). See also, *Illinois Cent. R. Co. v. Jernigan* (Ill.), 5 R. R. R. 535, 28 Am. & Eng. R. Cas., N. S., 535; *Anderson v. Central R. Co. of New Jersey* (N. J.), 7 R. R. R. 51, 30 Am. & Eng. R. Cas., N. S., 51; *Vogel v. North Jersey St. R. Co.* (N. J.), 7 R. R. R. 654, 30 Am. & Eng. R. Cas., N. S., 654 (child seven years of age incapable of contributory negligence); *Eskildsen v. City of Seattle* (Wash.), 7 R. R. R. 549, 30 Am. & Eng. R. Cas., N. S., 549 (child under five years of age cannot be chargeable with contributory negligence); *Givens v. Louisville & N. R. Co.* (Ky.),

Mitchell v. Illinois Cent. R. Co

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert R. Reid, Judge.

Action by Augustine Mitchell, tutrix, against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Hunter C. Leake and Bolivar E. Kemp (J. M. Dickinson, of counsel), for appellant.

Stephen D. Ellis and Benjamin Moore Miller, for appellee.

BLANCHARD, J. This case is here on appeal by defendant from a judgment against it for \$3,000.00 in favor of the plaintiff, who sued in her capacity as tutrix of the minor Osmer Southworth.

Neither party asked for a jury in the court below. The trial was had before the District Judge and the cause was submitted to him, without argument, on the evidence adduced.

Osmer Southworth was a boy of between twelve and thirteen years of age when the injury which gave rise to the suit was received.

He lived in the town of Amite at the home and under the care of his tutrix, and was a youth of good training and habits and of more than ordinary intelligence.

The frankness and candor of the testimony he gave in the case—his evident desire to state only the truth, without undue coloring of his side of the controversy—make a favorable impression.

7 R. R. R. 11, 30 Am. & Eng. R. Cas., N. S., 11 (sufficiency of evidence of capacity); *Anderson v. Union Terminal R. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 834 (nine years old); *Bess v. Atchison, etc., Ry. Co.* (Kan.), 19 Am. & Eng. R. Cas., N. S., 586 (age significant only as mark of capacity); *Trudell v. Grand Trunk Ry. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 316 (seven years); *Geist v. Missouri Pac. Ry. Co.* (Neb.), 22 Am. & Eng. R. Cas., N. S., 364; *St. Louis S. W. Ry. Co. v. Shiflet* (Tex.), 20 Am. & Eng. R. Cas., N. S., 38 (question for jury); *Illinois Cent. R. Co. v. Jones* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 16; *Adams v. Southern Ry. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 747; *Van Natta v. People's Street Ry., etc., Co.* (Mo.), 3 Am. & Eng. R. Cas., N. S., 433; *Weldon v. Philadelphia, W. & B. R. Co.* (Del.), 13 Am. & Eng. R. Cas., N. S., 759; *Illinois Cent. R. Co. v. Wilson* (Ky.), 21 Am. & Eng. R. Cas., N. S., 644 (nine years of age); *Schmitt v. Missouri Pac. Ry. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 216; *Atchison, T. & S. F. Ry. Co. v. Potter* (Kan.), 15 Am. & Eng. R. Cas., N. S., 660; *Tully v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 322 (eight years of age); *Lemasters v. Southern Pac. Ry. Co.* (Cal.), 20 Am. & Eng. R. Cas., N. S., 296 (seventeen year old boy's age could not be considered as bearing on question of contributory negligence); *Mason v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 83 (contributory negligence not attributable to child sixteen months of age); *Consolidated City & C. P. Ry. Co. v. Carlson* (Kan.), 7 Am. & Eng. R. Cas., N. S., 274 (ten year old boy failing to see street car, contributory negligence question for jury); *Gunn v. Ohio River R. Co.* (W. Va.), 6 Am. & Eng. R. Cas., N. S., 275 (child of tender years); *Goodrich v. Burlington, C. R. & N. R. Co.* (Iowa), 3 Am. & Eng. R. Cas., N. S., 620 (at crossings); notes, 19 Am. & Eng. R. Cas., N. S., 95, 356; 20 Am. & Eng. R. Cas., N. S., 322.

Defendant railroad runs through the town of Amite. It would, perhaps, be more correct to say the town is built up on the two sides of the railway. The principal street is called Railroad Avenue and through this extends the railway track. The avenue, including the centre space occupied by the tracks, is 300 feet wide, and in it is constructed, close to the tracks, the depot.

On either side of the space where the tracks are located runs a roadway, and these roadways are, properly speaking, the street, or two streets.

Fronting on these streets are business houses, stores, etc., facing towards the railroad, and further out on the streets, after leaving the business section, are dwelling houses.

In one of these, on the east side of the railroad, about three blocks away from the depot, lived young Southworth.

The railroad runs at that point north and south. Several streets, running east and west, cross it at right angles. The depot is situated between the two most important of these lateral streets, one north of it, the other south of it. Of the two, the latter is the more important—the street where the most of the crossing is done.

It was here that the youth was injured. The time was between eleven and twelve o'clock in the day about the middle of January, 1902.

He had been sent from home to mail some letters at the post office, which was located on the east side of the Avenue (his side), not far, we judge, from opposite the place where he was injured.

He had instructions, after mailing the letters, to visit the priest for religious instruction. The priest lived on the west side of the Avenue, and it was necessary to cross the railway tracks to reach his house.

At the point where the street crosses there are two tracks, a switch track and the main track. A few feet south of this crossing, on the east side, another switch-track begins, extending southward. And there are still other switch tracks along portions of the front of the town.

Indeed what might be called "the yard" of the railway at Amite extends through the town, and it is in evidence that much switching of cars is done there every day, and always there are to be seen freight cars left standing on some of the side tracks.

At the time mentioned, the north bound local freight train had reached Amite. On one of the side tracks were two freight cars which were to be added to this train. They were located on the side track at a point south of the depot. This side track ran up to and beyond the depot, and other freight cars were on it, at the depot platform, being unloaded at the time.

This being the situation, the conductor of the train stopped at a point south of where the southern end of the side track

ran into the main track, and detaching the engine, and four or five cars with it, from the remaining cars of the train, he ran the detached section into the side track, coupled the two freight cars standing there, and which were to be added to the train, to the pilot (cow-catcher) of the engine and backed out again on the main track.

He had determined to make what is called a flying or running switch. Making running switches, it is shown, were not unusual, though there is a rule of the company forbidding the practice.

Thus, Rule 528 of the Book of Rules intended for the governance of the employees of the Company reads:—

“A running switch must not be made when practicable to avoid it; but when made great care must be taken to prevent accident.”

It is in evidence that the two cars could have been gotten out of the side track and on the main track and annexed to the train without the making of the running switch.

Thus, the engine, with or without cars attached, could have gone to the north end of the side track, backed down southward upon the cars wanted, coupled them to the rear, pulled out again northward to the main track, and there backed down to that section of the train which had been detached and left standing upon the main track south of the depot.

But the conductor explains, and gives as the reason for not resorting to the ordinary and usual method of switching, that this would have necessitated disturbing the partially unloaded cars on the same side track, which were at the depot platform; would have checked the work of unloading there going on; would have necessitated the moving of these cars; this would, likely, have caused the freight, or some of it, piled up in these cars and left insecure by being deprived of the support of that portion of the freight (boxes, packages, etc.) already unloaded, to fall, causing injury to the freight, etc.

Hence, this decision to make the running switch. This was to be accomplished in this way:—the front section of the detached or divided train (consisting of the engine with four or five cars attached, and the two cars which had been pulled out of the switch at the south end and were now coupled to the front end of the engine) was sent up the main track northward to a point beyond the depot, and two hundred feet or more north of the north end of the other switch track which came into the main track just a few feet south of the cross street, or crossing, where the boy was injured. Having gotten up the track far enough for their purpose, the engine and rear cars were backed southward, and this pulled in the direction the two cars that were coupled to the pilot of the engine. Then, after getting these cars under good headway, the coupling pin was removed, thus detaching from the engine the two cars. With accelerated speed the engine then drew away from the two cars, which followed on after it.

The switch, which connected the side track, whose north end was just south of the crossing, had been opened to receive the cars and engine backing down rapidly to it, and after they had passed through it on to the side track the switch was to be closed in time to permit the two detached cars to go on down the main track to the rear section of the train standing south of the depot.

The flying switch was accomplished as described, though it appears to have been a risky proceeding. The evidence shows there was only about (say) 30 feet between the pilot of the engine and the trailing cars, just detached from it, as the engine passed into the switch.

So close was "the shave," so daring the attempt, that it attracted the attention of those standing around—even of persons upon the side walk of the street.

It also appears that it produced some excitement among the train's crew, all of whom were watching intently what was going on, and, apparently, waiting with some anxiety the result.

The crew consisted of the conductor, engineer, fireman and four brakemen.

The conductor had stationed himself on the south side of the crossing near the north end of the side track into which the switching of the engine and cars was to be made. One brakeman was at this switch and it was he that was to throw the switch at the proper time; another brakeman was stationed at the street crossing to keep people away while the switching was going on; another was on the pilot of the engine to uncouple the two cars; and the fourth was on the first of the advancing cars that were to be sent on down the main track in this running switch process. The engineer and fireman were in the cab of the engine, and it was the fireman who was then running the engine.

It is explained, though, that this was not unusual; that often a fireman will handle the engine, the engineer being present in the cab and, perhaps, directing things.

It would seem, however, that at so important a time as the making of a risky running switch the engineer himself should have been at the lever.

Just as the backing cars and engine were passing the street crossing and going into the open switch just south of the crossing, young Southworth came down the street from the post office. He was going westward on his way to visit the priest. He was moving in a fast walk, perhaps a little trot. He reached within a few feet of the main track, on which the cars were moving, just as the last cars behind the engine, and the engine itself, were backing past. He paused watching the passing train. Within a few feet of him was the brakeman, who had been stationed there to warn people; but his face was towards the engine and moving cars; he was intently watching the performance of the flying switch; he

was not facing towards the way people on that side would approach the tracks; he was giving no warning. He had a red flag, but it was in his pocket; he was not using it.

He explains he was not there to flag cars. True, but he was there to warn people, and a red flag in his hand and the waving of it would serve to give warning. And to this might have been added and should have been added the giving of attention to those who came up to the crossing, and observing them, and, if need be, telling them of the danger of attempting to cross, and warning them to look out for the two cars that were coming down following the engine. This was exactly what he was there for. But he was doing nothing of this kind. He was under the excitement incident to the attempt to make a daring flying switch.

He might just as well not have been there if he were not attending to the duties of the position.

Immediately following the passing of the engine the boy started forward to cross. He had not seen, he says, the two advancing detached cars. Nor had the brakeman there, as we have seen, looked around and given warning of them. The brakeman was not aware, even, the boy was there. Not until the boy started forward to cross did he see him.

Then he called out to him to beware; not to attempt to cross; but it was too late. The boy was on the track; the cars were upon him. The brakeman caught him and saved him from being crushed to death, but not in time to save him from serious harm. His left foot was run over by the first wheel on the east side of the first car and crushed.

There is some conflict of testimony as to whether, when the brakeman called out to the boy, if he had heeded the call and stopped, the disaster would have been averted. With District Judge, who saw and heard the witnesses, we think not. The boy was within a few feet—five or six—of the track when he started forward, and was, likely, on the track when the warning came. Had this warning been given before the boy started forward, a different case for the railroad, altogether, would be presented.

We have reached the conclusion to affirm the judgment on two grounds, (1) because the dangerous experiment of making the running switch should have been avoided—there being another and safer way—safer to the general public—of effecting the transfer of the two cars; (2) because of the gross negligence of the brakeman, stationed at the crossing, in giving his attention to the making of the running switch rather than to those who came up to the crossing, and failing utterly to give the warning he was sent there to give.

The first is remote and would not of itself suffice to fix the liability of the company; the second is direct and proximate. The two together justify the judgment appealed from.

The conductor's reasons for deciding to make the flying switch are not sufficient. With a little more pains and care

and time taken, the transfer of the two cars could have been made in a way not attended with the danger incident to the method he adopted. His company had forbidden him to make running switches when practicable to avoid them. It was practicable here to avoid it.

Rorer on Railroads, vol. 1, p. 491, after giving a definition of the running switch, says:—

“It is at all times and in all places an operation attended with more or less danger.”

Especially was it dangerous where attempted on the occasion under discussion. It had to be done over a prominent street crossing—the one most frequently used—in a town of many people and the resort of those living in the adjacent country, for it was the county seat of the Parish.

See *Curley v. Ill. Cent. R. Co.*, 40 La. Ann. 810, 6 South. 103; *Hamilton v. Steamship Co.*, 42 La. Ann. 824, 8 South. 586; *Downing v. Ry. Co.*, 104 La. 508, 29 South. 207.

Under such circumstances the making of the running switch was gross negligence. Some authorities hold making running switches to be negligence per se.

See *Ala. & V. R. Co. v. Summers*, 68 Miss. 566, 10 South. 63; *French v. R. Co.*, 116 Mass. 537; *R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Brown v. R. Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *R. Co. v. Garvy*, 58 Ill. 83; *R. Co. v. Baches, Administratrix*, 55 Ill. 379.

The Company's rule, heretofore referred to, required great care to be taken to avoid accident in those cases where resort to running switches was unavoidable, and in keeping with this requirement a brakeman was stationed at the crossing to give warning; but he failed to do so, as we have seen. This, then, was equivalent to neglect of the requirement of the rule (for the brakeman's failure was the company's), and to neglect of a plain duty which existed for the benefit of the public independent of the rule.

This failure to give the warning at the crossing, under the circumstances of this case, entails liability upon the company. The contention that the boy was guilty of such contributory negligence as relieves the Company, cannot be sustained.

It is true he could by looking to the right have seen the approaching detached cars, but not having been warned of the danger of the situation, and watching only the engine backing by, and seeing the space over the track left clear by its passage, he started across.

A boy of twelve years of age may be guilty of contributory negligence which bars his recovery. No doubt of that. But a boy of that age is not to be held to the same degree of care, prudence and circumspection which would be the case with an older person. The need for a watchman at the crossing for boys was greater than for older persons.

The case, in this respect, comes within the rule announced in *Downing v. R. Co.*, 104 La. 508, 29 South. 207; where it was

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held that, the precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury are increased, and their sufficiency is to be gauged by what is called for by the circumstances of each case. In that case, too, at page 517, 104 La., 29 South. 211, the observation of the court that the mere fact of certain railroad employees having been at a given place, where they should have been, amounted to nothing unless they performed the duties for which they were placed there, applies with force to the failure of the brakeman here to give the warnings at the crossing which he was sent there to give.

In *McGovern v. R. Co.*, 67 N. Y. 421, it was said:—

“In respect to contributory negligence on part of the boy, it is claimed that the evidence shows he did not look, before stepping upon the track, to the west, and that if he had done so he would have seen the engine, and the accident would not have happened. The rule which requires persons before crossing a railroad track to look to see whether trains are approaching, and that if they omit to do so and are injured by a collision, which if they had looked would have been avoided, are to be deemed guilty of negligence, is not to be applied inflexibly, and in all cases, without regard to age and circumstances. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care and circumspection in a child of tender years as in an adult.”

In *Railroad Co. v. Young* (Ga.) 10 S. E. 197, it was held that due care according to its age and capacity is all that can be expected of a child of tender years. While a boy of twelve is not to be regarded as “of tender years,” still he is not to be held to the same accountability in the matter of contributory negligence as a full grown person is.

A case like the present one, where a railroad company is engaged in the performance of a hazardous undertaking (one forbidden by its rules) without using proper precautions to safeguard the public, is to be differentiated from one where a person is injured by his failure to observe necessary precautions against the ordinary and usual dangers to be anticipated at a railroad crossing.

See *Ferguson v. Railroad Co.* (Wis.) 23 N. W. 123; *Bower v. R. Co.*, 61 Wis. 457, 21 N. W. 536.

It would seem that where a railroad company has stationed a flagman at a public crossing, for the purpose of warning persons about to cross its tracks, the public have the right to rely (not absolutely, perhaps, but reasonably so) upon the flagman to give proper notice and warning of danger.

Thus in *R. Co. v. Hutchinson*, 120 Ill. 82, 11 N. E. 855, it was said:—

“This Court is not prepared to say, as a matter of law, that a person approaching a railroad crossing, when there is nothing apparent to warn him of danger, and at which he knows

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a flagman is stationed, whose duty it is to warn all persons of danger from moving trains, is required to look elsewhere than to the flagman. It is the duty of a flagman at a public street crossing in a populous city, which is much used by the public, to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty."

The same doctrine was announced in *Clough v. R. Co.* (Ill.) 25 N. E. 664, and in *R. R. Co. v. Wilson* (Ill.) 24 N. E. 555.

In referring to this doctrine it is not necessary for us to go any further (and we do not now do so) than to give our adhesion to it as applicable to the facts and circumstances of this case. We do not announce it as a rule general in its application in this State.

The instant case comes within the rule of the *Downing Case*, 104 La. 508, 29 South. 207, in another respect. There the Court rested its decision largely upon the fact that the man killed was taken by surprise by the near approach of the working train, and that the employees of the railroad company whose duty it was to keep a lookout and give warning did not do so. Here, young Southworth testifies he knew not of the approach of the detached cars, did not see them, was watching the passing engine, and considering the way open attempted the crossing—not to undertake which he had no timely warning from the brakeman stationed there for the purpose.

Judgment affirmed.

BREAUX, J., dissents.

CAMPBELL *et ux.* v. ST. LOUIS & SUBURBAN RY. CO.

(Supreme Court of Missouri, Division No. 1, May 27, 1903.)

[75 S. W. Rep. 86.]

Accident at Street Railway Crossing—Injury to Boy—Contributory Negligence.*

In determining whether a 16 year old boy, killed by a street car while driving over a crossing, was guilty of contributory negligence, his conduct is to be measured by the standard of an ordinarily prudent boy of his age, and not by that of a man of mature years.

Same—Same—Same.

Whether a 16 year old boy, killed by a construction car while attempting to drive across a street car track at a street crossing, was guilty of contributory negligence, *held*, under the evidence, to be a question for the jury.

Same—Violation of Ordinances—Evidence.

Where both parties to an action against a street railway for negligent death tried the case on the theory that defendant was not liable for a violation of the ordinances governing the running of street cars,

*As to the care required of children for their own safety, see preceding case and foot-note.

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unless it was shown that it had agreed to be bound by such ordinances, an ordinance showing such an agreement on the part of defendant was relevant.

Street Railways—Duty to Comply with Ordinances.

By accepting St. Louis Ordinance No. 19,393, granting to defendant a franchise for a branch on condition that it complies with all the general ordinances and charter provisions in relation to street railroads then in force or thereafter to be enacted, and "applicable to its entire line of railroad, or any part thereof," defendant agreed to be bound by all the ordinances relating to street railroads, not only as to the branch, but as to its entire line, if such agreement was necessary.

Ordinances—Evidence.

Under the express provisions of Rev. St. 1899, § 3100, a volume of ordinances purporting to be published by authority of a city is admissible as evidence of an ordinance contained therein.

Same—Validity—Street Railway—Franchises—Speed of Cars.

St. Louis Ordinance No. 15,954, granting to defendant a franchise to construct a line over certain streets and alleys, and authorizing it to run cars on that part at a rate of 20 miles an hour, is not in violation of City Charter, art. 3, § 28, providing that no special or general ordinance in conflict or inconsistent with a prior ordinance shall be valid until such prior ordinance, or its conflicting point, is repealed by express terms, as it does not attempt to repeal the general ordinance limiting the speed of street cars to 8 miles an hour, but only makes an exception to its operation, having it in full force as a general rule.

Cars—Speed—Evidence.

On a mere showing that a person had for 20 years the common experience of a city man traveling on street cars, he was not competent to give an opinion as to the speed of a car, based on the noise heard at a distance of more than 120 feet.

Instructions.

Where there was no evidence available to plaintiff in an action for negligent death to support the hypothesis that defendant's motorman failed to stop on the first appearance of danger to the deceased, it was error to instruct that, under an ordinance, defendant's motorman was bound to stop on the first appearance of danger, and was negligent if he failed to do so.

Same.

Where the evidence was conflicting as to whether defendant's street car had a headlight at the time of the accident, the court properly refused to instruct the jury to find in its favor if plaintiff's intestate was driving toward its track in a wagon which had no light, and defendant's motorman could not, by the exercise of ordinary care, have discovered the horse and wagon in time to avoid the collision after they came within range of the car.

Same.

Where, in an action against a street railway for the death of a driver at a crossing, there was no contention that defendant was liable notwithstanding the negligence of the deceased, the court properly refused to instruct that defendant was entitled to a verdict if the car was running at such a rate of speed that when the danger to the deceased could have been discovered the motorman could not stop the car in time to avert the accident, even though it was running at the highest rate of speed mentioned by any witness.

Accident at Crossing—Death of Boy—Stop, Look and Listen—Absence of Headlight—Question for Jury.†

Whether a 16 year old boy, killed at a street car crossing, should

†As to whether the stop, look and listen rule is applicable to street railway crossings, see foot-note appended to *Wolf v. City & Suburban Ry. Co. (Ore.)*, 7 R. R. R. 777, 30 Am. & Eng. R. Cas., N. S., 777; foot-note appended to *Burns v. Metropolitan St. Ry. Co. (Kan.)*, 6 R. R. R.

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have stopped to look and listen for a car before driving onto the track at a crossing on a dark and foggy night, *held* to be a question for the jury; the evidence being conflicting as to whether the car had a headlight.

Instructions.

A requested instruction in an action against a street railway for the negligent death of a driver at a crossing, that the deceased was negligent if he drove onto the track without looking and listening for a car, and could have seen or heard the car, had he done so, was not covered by an instruction that he was negligent if he failed to use ordinary care in driving across the track or looking out for approaching cars, and was improperly refused.

Appeal from Circuit Court, St. Louis County; John W. Booth, Judge.

Action by Thomas J. Campbell and wife against the St. Louis & Suburban Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

Clinton Rowell, Jos. H. Zumbalen, and S. P. Spencer, for respondents.

VALLIANT, J. This is a suit for damages, under section 2864, Rev. St. 1899, for the death of plaintiffs' minor son, which they allege was caused by the negligence of the servants of the defendant in running a car on its railway. Defendant operates a street railway in St. Louis. The accident occurred at the point where defendant's tracks cross Whittier street. At that point defendant's tracks run east and west, and Whittier street north and south. Plaintiffs' son, who was 16 years old, was driving a grocery delivery wagon, going south on Whittier street, shortly after 6 o'clock in the evening, November 3, 1899, when, as he was crossing defendant's south track, the wagon was struck by a car with such violence that he was thrown out and instantly killed. The petition states that at that time there was an ordinance of the city which required the servants of defendant in charge of the car to keep a vigilant watch for vehicles and pedestrians either on the track or moving towards it, and, on the first appearance of danger to such vehicles or pedestrians, to stop the car in the shortest time and space possible, and that such cars after sunset should be provided with signal lights, and no car be run at a greater speed than eight miles an hour. It then states that the servants of defendant so negligently managed the car on this occasion as to cause it to strike the wagon.

476, 29 Am. & Eng. R. Cas., N. S., 476; Hurley v. West End St. Ry. Co. (Mass.), 1 R. R. R. 229, 24 Am. & Eng. R. Cas., N. S., 229; Nashville Ry. v. Norman (Tenn.), 4 R. R. R. 350, 27 Am. & Eng. R. Cas., N. S., 350; Haas v. Chester St. Ry. Co. (Pa.), 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810; Keenan v. Union Traction Co. (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64 (electric railway in the county); Chisholm v. Seattle Electric Co. (Wash.), 1 R. R. R. 635, 24 Am. & Eng. R. Cas., N. S., 635; McNab v. United Railways & Electric Co. (Md.), 2 R. R. R. 39, 25 Am. & Eng. R. Cas., N. S., 39 (electric railways in the country.)

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and throw the plaintiffs' son therefrom and kill him. Then the petition specifies four acts, as of negligence, which it alleges defendant committed, to wit, that there was no headlight; that the car was running 20 miles an hour; that the men in charge did not keep a vigilant watch, and failed to stop the car in the shortest time and space possible on the first appearance of danger to the vehicle; and that they failed to ring a bell on approaching the crossing. The answer was a general denial, and a plea that the plaintiffs' son was negligent, in that he drove on defendant's track without looking or listening for an approaching car, and thereby contributed to the accident. Reply, general denial.

The testimony for plaintiffs tended to prove as follows: Defendant's tracks are laid in an alley that runs east and west between West Bell street, on the north, and Morgan street, on the south. It is an unusually wide alley, being about 60 feet in width; the defendant owning a right of way 20 feet wide through the center. There are two tracks; the north track being used for the west-bound cars, and the south track for the cars east bound. Whittier street runs north and south, intersecting the above-named streets, alley, and railroad tracks at right angles. This is in a residence district in the western portion of the city. The next street west of Whittier, and parallel to it, is Pendleton; the next, Newstead; and the next, Taylor avenue. The railroad tracks are on a straight line and level from Whittier street to Taylor avenue and beyond. There is a roadway in the alley on the north side of the tracks, 20 feet wide, and one on the south side 23 feet wide. In the angle made by the west line of Whittier street and the north line of the alley is a two-story brick stable. There were telegraph poles along the line of the railroad, one of which was just west of Whittier street. There was an arc light at the intersection of Whittier and West Bell streets, but no light at the crossing of the tracks. The night was dark and foggy. Whittier street was paved with vitrified brick, which pavement extended down to the railroad tracks. A wagon passing over the pavement made considerable noise. The vehicle in which plaintiffs' son was driving was an ordinary grocery delivery wagon, covered at top and sides, except that on each side, by the driver's seat, it was open for a space of 18 inches, so that the driver could see to the right and the left as well as to the front. On this occasion he came from the north, driving south on Whittier street, and, without stopping or slackening his pace, crossed the north track; and just as he got on the south track the wagon was struck by an east-bound car, and he was thrown out and instantly killed. It was not a regular passenger car, but a construction or repair car. It carried no headlight, but there were lights inside, and an incandescent bulb in the hood at the front of the car, with a reflection throwing the light upward, designed to enable the operator to see the wire overhead. The plaintiffs'

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witnesses variously estimated the speed of the car at 12, 15, and 20 miles an hour. It did not slacken its speed until it struck the wagon, and it stopped about 120 feet east of Whittier street. Four of plaintiffs' witnesses heard the car when it was halfway between Pendleton and Whittier streets, and recognized by the sound that it was a car approaching rapidly. Only one of these was in a position to see in that direction, and she testified that she saw the car midway between Pendleton and Whittier streets. This witness was standing in the alley on the north side of the tracks at the back gate of the second house east of Whittier street, so that she was about 250 feet from the car when she first saw and heard it. Another one of these four witnesses was in the rear room of the same house, with the windows closed; and she heard, but did not see, it. Another was standing on the front porch of house No. 4206 West Bell street, which is the second house west of Whittier. It was about 130 feet from where he stood to the north line of alley, the house intervening. He was permitted to testify, over the defendant's objection, that, judging from the noise of the car, it was running 12 to 15 miles an hour. One of plaintiffs' witnesses, who at the time of the accident was in the employ of the defendant, and on this car, testified that it was his duty to put the headlight on the car, and that he did so. The headlight was burning when the car left De Hodiamont, but, whether it was burning when they reached Whittier street, he did not know. This witness and another for plaintiffs testified that the car, running 12 to 20 miles an hour, could be stopped in 35 to 50 feet.

Over the objection of defendant, the plaintiffs read in evidence a duly certified copy of an ordinance of the city (No. 19,393, approved June 10, 1898) authorizing the defendant to build and operate a branch of its road through a portion of Union avenue to Forest Park, the conditions of which had been duly accepted in writing by the defendant, and one clause of which was as follows: "The St. Louis & Suburban Railway Company, in accepting this ordinance, agrees to comply with the provisions of all general ordinances and charter provisions affecting street railroads that may be in force or which may hereafter be enacted and applicable to its entire line of railroad or any part thereof." Then, over the objection of defendant, plaintiffs read in evidence, from the volume of Revised Ordinances of 1892, sections 1275 of Ordinance 17,188, which provides that no car shall be drawn at a greater speed than eight miles an hour; that the motorman of each car shall keep a vigilant watch for all vehicles, either on the track or moving towards it, and on the first appearance of danger to such vehicle the car shall be stopped in the shortest time and space possible; and that all cars, after sunset, shall be provided with signal lights.

At the close of the plaintiffs' evidence, the defendant asked

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an instruction in the nature of a demurrer to the evidence, which the court refused. To the introduction of evidence over defendant's objections, and to the refusal of the instruction asked, exceptions were duly saved.

The evidence for defendant tended to show: That the car was running 10 or 12 miles an hour. That the headlight was burning, and continued to burn until the lamp was broken in the collision. That the gong was sounded at a point 60 feet before reaching the street. That the motorman, as he approached Whittier street, had taken the slack out of the brake, which tends to slacken the speed and place the car under control. On approaching within 6 or 8 feet of the street, and seeing nothing on the crossing, he let off the brake, and then, for the first time, saw the horse on the west-bound track. He immediately set the brake and reversed the power, but the reverse action did not take effect, and the collision resulted. The car went 60 or 70 feet east of Whittier street before it stopped. The headlight did not illumine the whole street, but only to the west-bound track. When the motorman let go the brake, there was nothing in sight. When the horse came in view, it was not more than 15 feet from the car, and was going quite fast. The space within which a car could be stopped, going as this was, was 60 to 90 feet.

Defendant offered in evidence Ordinance No. 15,954, entitled "An ordinance authorizing the St. Louis & Suburban Railway Company to acquire, construct and maintain a double track passenger railroad on, along and across certain streets, alleys and city blocks in the city of St. Louis," etc., approved February 6, 1891. This is the ordinance under which the defendant had acquired and was operating this part of its railway when the accident occurred, and it authorized the defendant to run its cars on that part of its road at a rate of 20 miles an hour. Plaintiffs objected to the evidence on the ground that it was invalid in so far as it essayed to authorize defendant to run its cars at the rate of 20 miles an hour, in the face of the general ordinance in evidence limiting the speed of cars to 8 miles an hour, and in violation of section 28, art. 3, of the city charter (Rev. St. 1889, p. 2100), which provides that "no special or general ordinance, which is in conflict or inconsistent with general ordinances of prior date, shall be valid or effectual until such prior ordinance, or the conflicting part thereof, is repealed by express terms." The court sustained the objections, and defendant excepted.

The case was submitted to the jury on instructions which, together with other instructions asked and refused, will be hereinafter considered, exceptions thereto having been duly saved. The result of the trial was a judgment for plaintiffs for \$5,000, from which defendant appeals.

1. The first question is, did the court err in refusing the instruction in the nature of a demurrer to the evidence? The

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argument in support of that instruction is that the plaintiffs' evidence shows that the deceased was himself guilty of negligence which contributed to the accident. From the facts and circumstances shown by the plaintiffs' evidence, the conclusion might reasonably be drawn that the deceased was guilty of such negligence, but, unless that is the only conclusion that can reasonably be drawn from those facts and circumstances, the demurrer to the evidence was properly overruled. If the evidence was such that there could reasonably be no two opinions about it, then its effect should have been declared by the court as a matter of law; otherwise it was a question of fact for the jury. *Gratiot v. Ry.*, 116 Mo. 450, 21 S. W. 1094, 49 Am. & Eng. R. Cas. 398, 16 L. R. A. 189; *Weller v. Ry.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532, 22 Am. & Eng. R. Cas., N. S., 61. That the boy could have seen the car coming, if he had looked, may be inferred from the testimony of Annie Pierson, the witness for plaintiffs who stood at the back gate of the house 4188 West Bell street. She was the only one of plaintiffs' witnesses who was in a position to see it, and she testified that she saw it when it was midway between Pendleton and Whittier streets, and heard it, also, and that it had no headlight. She was east of Whittier street, and farther from the car than the boy was after he came into the alley, clear of the stable; and, if there were any telegraph poles to obstruct his view, they would have obstructed her view, also. Then there was the testimony of three other witnesses for plaintiffs, who, although they were not in positions to see, yet testified that they heard the car coming, and recognized what it was. There is room to suspect that Annie Pierson might have been mistaken as to having seen the car, if, as she said, it had no headlight, and if, as all the witnesses said, it was a dark, foggy night. And yet it is not improbable that she did see it, because she had been standing there 10 minutes, her eyes had become accustomed to the darkness, and she may have recognized the car by other lights than the headlight. Whether she saw the car, or not, was a question for the jury. The plaintiffs were not bound entirely by her testimony on that point. It was incumbent on the boy to have used his eyes and ears before driving on the track, and, if all that these witnesses said was true, he would have seen or heard the car if he had stopped and looked and listened. Whilst it is the duty of one under such circumstances to look and listen, and sometimes it is his duty to stop in order the better to see and hear, yet it is not always incumbent on him to stop for that purpose; and whether he should do so, or not, in a given case, depends on the circumstances, and, if it is doubtful, the jury are to judge of it. In this instance the boy did not stop, and whether he looked or listened, we can only judge by inference. It may be that he both looked and listened, but that he was deceived by the fact, if it was the fact, that there was no headlight, and that

his listening was rendered ineffectual by the noise of his own wagon rattling over the vitrified brick pavement. It has often been said that a man approaching a railroad with the purpose of crossing it is chargeable with the duty to himself of looking and listening for a train. There is nothing technical about that rule. It is the dictate of common sense, and one's conduct in relation to it must be judged with common sense. What the law requires is the exercise of that degree of care which such persons of ordinary prudence under like circumstances usually exercise. To determine in a given case whether or not such care has been exercised, the triers of fact must consider who the person is; his age, condition, experience; the time, place, and all the surrounding conditions. The most of what is said in our books on the subject of the duty of one about to cross a railroad track to look and listen is said in cases of crossings of steam railroads in the country, but the principle applies also to crossings of street railroads in cities. Yet conduct that might well be regarded as negligence in the one case need not necessarily be so regarded in another. The noise of an approaching train on a steam railroad in the country is more easily heard and distinguished for what it is than is the noise of a street car, which is often undistinguishable in the roar of the city, so that a jury in the one case might well say that the person did not use his sense of hearing, because, if he had listened, he could not have failed to have heard and recognized the noise of an approaching train, while in the other they might reasonably conclude that the fact that he did not seem to hear and recognize the noise of an approaching street car did not conclusively show that he was negligent in the matter of listening. The triers of the fact must decide that question under the peculiar circumstances of the particular case in hand.

A fact to be borne in mind in this case is that this was not a passenger car, whose familiar appearance would be at once recognized by one used to seeing street cars, and for the like of which one would, at a crossing, naturally be on the lookout; but it was a construction car, whose outlines at night were not so easily seen, or, if seen, recognized for what it was. Therefore, in passing on the question of whether the plaintiffs' son was negligent in failing to see this car, we must remember that it was not such an object in appearance as one looking out for a car would expect to see, and that it is possible that, through the darkness, he might have seen this object without recognizing what it was.

There is another important fact to be taken into consideration in passing on the question of contributory negligence in such case; that is, the age and condition of the person whose conduct is under inquiry. Here was a boy 16 years old—old enough to be held accountable for his acts, but not to be judged as we would judge a man of mature years. The ques-

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tion is not what would an ordinarily prudent man of mature years have done under like circumstances, but what would an ordinarily prudent boy of 16 years have done under like conditions? Care and prudence increase with that experience which years of maturity bring, but do not come by intuition to a boy in whose veins the blood of youth is leaping, and to whom danger is a pleasant incentive. Reasonable men, considering the case, might construe the conduct of a mature man to be inconsistent with the care that should be expected of him, and therefore adjudge him guilty of negligence, and yet construe the same conduct in a boy of 16 years as nothing more than was to be expected of one of his age. We do not mean to say that a boy 16 years old is to be excused when he fails to exercise that degree of care to be expected of an ordinarily prudent boy of that age, but we mean that he is to be measured by the standard of an ordinarily prudent boy, not by that of an ordinarily prudent man of mature years. *Beach on Contributory Neg.* (3d Ed.) § 216; 7 *Am. & Eng. Ency. L.* (2d Ed.) 405; *Plumley v. Birge*, 124 *Mass.* 57, 26 *Am. Rep.* 645. In this case the boy had a right to expect that there would be a headlight on any car on that road, and if he looked in both directions as he approached the tracks, and saw no headlight, and if he then concluded, for that reason, that there was no car coming, and drove on the track, the court had no right to say, as a matter of law, that he was guilty of contributory negligence. We do not mean to say that he was not guilty of contributory negligence, or that the jury would not have been justified in finding him guilty; but we mean that men might reasonably differ about it, and therefore it was for the jury to say whether, under all the circumstances, he was or was not guilty.

The court did not err in overruling the demurrer to the evidence.

2. The court did not err in overruling the objection to the admission in evidence of Ordinance No. 19,393. Both parties tried the case on the theory that it was necessary for the plaintiffs to show that the defendant had agreed to be bound by the ordinances of the city governing the running of street cars, before it could be held liable for a violation of the same. Therefore, whether that is a correct theory or not, neither party is in a position to question it in this case. That ordinance was relevant evidence, if it was necessary for the plaintiffs to make such proof. The objection made by defendant was that it related only to that branch of defendant's road, which was named in the ordinance. Whilst the license conferred by the ordinance related only to the branch therein named, yet that license was made the consideration for which the defendant agreed to be bound by all the general ordinances and charter provisions in relation to street railroads then in force or thereafter to be enacted, "applicable to its entire line of railroad, or any part thereof." Therefore,

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if it was necessary for defendant to agree to obey the law before it would become binding on it, there was such agreement, based on a valuable consideration, and made applicable not only to the branch authorized in the ordinance, but to defendant's entire line. The objection to the reading in evidence of section 1275, art. 6, of Ordinance 17,188, from the volume of Revised Ordinances, was also properly overruled. That volume purported to be published by authority of the city, and was admissible in evidence, under section 3100, Rev. St. 1899.

3. But it was error to have sustained the plaintiffs' objection to Ordinance 15,954, offered in evidence by defendant. That ordinance authorized the defendant to run its cars on the part of its road where this accident occurred at 20 miles an hour. The objection was that the ordinance was invalid, under section 28, art. 3, of the city charter, hereinabove quoted, because in conflict with the general ordinance above mentioned, which limited the speed of street cars to eight miles an hour; the general ordinance not being expressly repealed. That point has been decided by this court, in *Ruschenberg v. Ry.*, 161 Mo. 70, 61 S. W. 626, contrary to the plaintiffs' contention. It was in that case decided that a similar ordinance, relating to a portion of the road of another street railway company in the city, was not, in effect, an attempt to repeal the general ordinance by implication, but only the making of an exception to its operation, leaving the ordinance in full force as a general rule. That is a correct construction of the ordinance and of the charter provision.

4. One of the plaintiffs' witnesses, standing on the front porch of his residence, at No. 4206 West Bell street, in which position he was about 125 feet from the alley, with the house intervening, was permitted to give his opinion as to the speed of the car, judging alone from the noise it made. He said it was running between 12 and 15 miles an hour. It was not claimed that he had ever made any particular study of the subject, or that he had even been in the business of operating street cars, but he had for 20 years or more the common experience of a city man traveling on street cars. Long training and study make men so proficient in particular subjects that they sometimes really know more than to the casual observer seems possible, and therefore we ought to hesitate to pronounce as impossible the possession of such knowledge when it is claimed with a fair show of reason. But when very unusual technical knowledge is claimed, the party offering the evidence ought to be able to show the court that such attainment is practicable by experience and study, and that it is so recognized in the particular trade or science. There is no sound more familiar to the ears of a city man than that made by a street car in motion, and one may by the sound form some idea as to whether the car is moving fast or slowly, but to the man of common experience the idea

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is very indefinite. When such evidence is offered, the court, in the first instance, must pass on the question of the qualification of the witness to give an opinion; and, unless the court is satisfied that the witness is really enabled to give something more than a vague guess, it ought to rule the evidence out, as not worthy to influence a verdict. The objection to this evidence ought to have been sustained.

5. For the plaintiffs the court instructed the jury that, as required by the city ordinance, the defendant's motorman "was bound to keep a vigilant watch for persons on foot, and for vehicles either upon its track or moving towards it, and, upon the first appearance of danger to such person or vehicle, said motorman was bound to stop the car within the shortest time and space possible," and that, if he failed to do so, he was guilty of negligence, and, if such negligence caused the accident, the defendant was liable, provided the deceased was himself exercising ordinary care. Appellant contends that this instruction was erroneous, for two reasons: First, that defendant had not agreed to be bound by the ordinance; second, that there was no evidence that the motorman did not keep a vigilant watch, or that he did not stop the car in the shortest time and space possible, upon the first appearance of danger. What has already been said in paragraph 2 of this opinion disposes of the first of these objections. The second objection, however, is more serious. The plaintiffs are in the position of saying that the driver of the wagon could not see the car because the night was dark and foggy, and there was no headlight. The motorman was in no better position to see the wagon than the driver was to see the car. The same darkness which hid the one hid the other. If the telegraph poles obstructed the view of the driver, they were there to obstruct the view of the motorman also. Annie Pierson said she saw the car, but did not see the wagon until it was struck. She was in a better position than the motorman was to see the wagon. One of the plaintiffs' witnesses (Schira) said that the motorman could see a wagon on Whittier street when he was 150 feet west. But that witness did not come on the scene until after the accident had occurred, and what he said was only his opinion on a subject which, from aught that appears, he knew no more about than any one of the jurors trying the case. Plaintiffs insist that it was a dark, foggy night, and there was no headlight on the car. If those are the facts, then the only evidence that the motorman failed to keep a vigilant watch was the failure to have a headlight to enable him the better to see, for a man cannot be said to keep a vigilant watch if he lets his lamp go out. But if it was dark, and there was no headlight, and he could not see the wagon, what appearance of danger was there for him to guard against by stopping the car in the shortest time and space possible? The ordinance does not require the motorman to stop the car on the first appearance

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of a vehicle approaching the track, but on the first appearance of danger. There must therefore be an appearance of danger before the mandate of the ordinance to stop the car is applicable. We are not now discussing the question of negligence in running a car in the dark without a headlight across a public street, but we are limiting our attention at present to the requirements of this ordinance. If the plaintiffs be limited to their own testimony, and to their own theory of a dark night and no headlight, there was no foundation in the evidence for the instruction now under discussion. The only hypothesis upon which that instruction can rest is that there was a headlight, as the defendant's witness testified there was. The motorman testified that the headlight was burning, and that it threw the stream of light down the track on which he was moving, and enabled him to see the wagon on the north track, but that the light extended no farther than that track. He also said that as soon as he saw the wagon he threw on the brake and reversed the motor, but that it failed to take effect. If that testimony is true, then he was not guilty of violating the ordinance, for he did all that he could do in the emergency. But the jury were the judges of the weight to be given his testimony. If they credited part of his testimony and discredited part, they were acting within their province. And so it was with the plaintiffs' evidence, the jury were free to believe and to disbelieve as their judgment dictated. There was evidence for the plaintiffs that this car, when going at the speed it was, could have been stopped, with the appliances at hand, in a space of 35 to 50 feet. The defendant's evidence was that it required 60 to 90 feet. Plaintiffs' evidence was that the car ran 125 or 130 feet east of Whittier street before it stopped. The evidence of defendant was that it went only 60 or 70 feet east of the street. If there was a headlight, and if the car could have been stopped in 35 to 50 feet, and it was not stopped until it went 125 or 130 feet beyond the east line of the street, those facts furnished the foundation for an argument that the motorman did not stop in the shortest time and space possible after he saw the danger. To build a case on that theory, however, the plaintiffs must abandon their position in regard to there being no headlight, and fall back on the defendant's evidence which tends to show that there was a headlight. But the plaintiffs cannot abandon their first position for the reason that they barely escaped being forced to a nonsuit on the theory that there was no headlight. If there was a headlight, the boy could not have failed to have seen it if he looked; and if he saw it, but did not heed it, or if he did not see it because he failed to look, he was guilty of negligence. There was no evidence available to the plaintiffs to support the hypothesis that the motorman failed to stop the car in the shortest time and space possible on the first appearance of danger. It was error, therefore, to have given that instruction.

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6. The second instruction given for plaintiffs was based on the general ordinance which forbids the running of street cars at a greater speed than eight miles an hour. It instructed the jury that, if the car was being run at a greater speed than eight miles an hour, the act was negligence. The giving of that instruction was error, for the same reason given in paragraph 3 of this opinion, holding that the court erred in sustaining the objection to the ordinance allowing defendant to run its cars on that part of its road 20 miles an hour. From this it follows, also, that it was error to have refused defendant's instruction 9, which was the contrary to plaintiffs' second instruction.

7. The third instruction for plaintiffs is that the burden of proving negligence on the part of the deceased was on the defendant, and submits that question to the jury in unobjectionable form. The objection appellant urges against it is that the evidence for plaintiffs, as well as that for defendant, shows so unquestionably that the deceased was guilty of negligence, that the court should have so peremptorily ruled, and have taken the case from the jury. We have discussed that question in the first paragraph of this opinion. For the reason there shown, it was not error to have given plaintiffs' third instruction.

8. The court refused the following instruction asked by the defendant: "(6) The court instructs the jury that if they believe from the evidence that Howard C. Campbell was driving south on Whittier street in a wagon which had no light, and that said wagon and the horse drawing the same could not have been discovered by said motorman, in the exercise of ordinary care, in time to avoid a collision after said wagon or horse came within range of the car—that is to say, near enough to the track to be in danger of being hit by the car—then your verdict should be for the defendant." That instruction would exonerate the defendant, notwithstanding the boy may have been misled into danger by the neglect of the defendant to have a headlight on its car, and notwithstanding the fact that the failure of the motorman to discover the danger may have been caused by the absence of a headlight. The instruction was properly refused. The eighth instruction asked by the defendant has the same defect, and was properly refused.

9. The court refused the following: "(7) The court instructs the jury that if you believe from the evidence that when the dangerous position of Howard C. Campbell, or of his wagon or team, could have been discovered by the motorman by the exercise of ordinary care on his part, the car which struck said wagon was running at such a rate of speed that the said motorman in charge of said car could not stop the said car in time to avert a collision with said Campbell, or his said wagon or team, by the exercise of ordinary care on the part of said motorman, and the use of the appliances

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at his command, then it is your duty to find a verdict for the defendant, even though you may believe from the evidence that the car which struck the wagon was running at the time of the collision, or immediately before that time, at the highest rate of speed mentioned by any witness." If there had been any question in this case as to the liability of the defendant notwithstanding the negligence of the deceased, that would have been a proper instruction, but under the evidence no such question arose. The instruction was therefore properly refused.

10. The court refused the following: "(10) The court instructs the jury that even though they believe from the evidence that the pavement on Whittier street at and about the place where the collision occurred between the defendant's car and the wagon and horse driven by the deceased was paved with vitrified brick, and that by reason of that character of pavement the horse and wagon driven by the deceased made such a noise when passing over the same that the deceased was unable to hear an approaching car while his horse and wagon were in motion, yet the jury are further instructed that it was then the duty, under such circumstances, of the deceased, before entering upon defendant's track, to stop his horse and wagon so as to be able both to listen and to look for an approaching car, and to hear the noise of the same, if the jury believe from the evidence that the car in question made a noise that would enable him to hear it if the deceased had stopped and listened for the same; and if the jury further believed from the evidence that by so stopping his horse and wagon he could have heard the approaching car before going upon the defendant's track, and in time to avoid a collision, but that he failed to do so, but, upon the contrary, went upon the track without stopping his horse and wagon for the purpose of listening for an approaching car, then in that case the jury are instructed that such conduct on the part of the deceased was negligent, and the verdict of the jury should be for the defendant." The question whether or not ordinary care required a person about to cross a railroad track to stop, the better to see and hear, is like the question whether or not the plaintiff in a given case was guilty of contributory negligence. It is sometimes a question of law, and sometimes a question of fact. Sometimes there can be no two reasonable opinions about it. Then it is the duty of the court to decide it as a matter of law. But sometimes it is doubtful. Then it should be left to the jury. There is no doubt but that prudence required one in the condition of this boy to stop, and, if he had stopped, the probabilities are that he would have at least heard the car. But the question is, what degree of prudence required him to stop? The standard that he is to be judged by is that degree of prudence that is reasonably to be expected of a 16 year old boy, and in this case the question of whether

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there was or was not a headlight to warn him was to be considered in determining whether he did or did not exercise that degree of prudence when he failed to stop. Whether, therefore, the degree of prudence with which he was chargeable demanded that the boy in this case should have stopped to look and listen, was a question of sufficient doubt to be left to the jury; and the court therefore did not err in refusing the instruction which declared it to be his duty, as a matter of law, to do so, and negligence if he did not.

11. The court refused the following: “(11) The court instructs the jury that if they believe from the evidence that Howard C. Campbell drove upon the track of defendant’s line on Whittier street without looking and listening for an approaching car on said track, and that, if said Howard C. Campbell had looked and listened for an approaching car before entering upon said track, he could have seen or heard the east-bound car approaching on the defendant’s track, then Howard C. Campbell failed to exercise ordinary care in so driving upon said track, and his said failure to look and listen was negligence on his part, and your verdict should be for the defendant.” It certainly was the duty of the driver of the wagon to look and listen, and there was sufficient in the evidence to raise a question if he did either. The instruction was probably refused on the idea that the same hypothesis was presented in instruction No. 5 given for the defendant, which directed a verdict for the defendant if the jury should find that the accident resulted from the negligence of the deceased “in failing to use ordinary care in driving across defendant’s tracks, or in failing to use reasonable care to look out for the cars approaching on defendant’s track.” But the defendant was entitled to the more explicit instruction on this point. The court erred in refusing that instruction. Instruction 12 refused is but a duplicate of instruction 11.

For the errors above mentioned, the judgment is reversed, and the cause remanded to be retried in accordance with the law as herein declared.

BRACE, P. J., concurs. MARSHALL, J., concurs in result. ROBINSON, J., absent.

HERRING v. CHESAPEAKE & W. R. Co. et al.

(Supreme Court of Appeals of Virginia, Sept. 17, 1903.)

[45 S. E. Rep. 322.]

Appeal—Jurisdictional Amount.

Interest which would necessarily accrue upon the amount of the claim is to be added to the principal in determining whether the amount involved is sufficient to give this court jurisdiction.

Carriage of Freight—Contract—Evidence—Waybill.

A fact that a car is waybilled to a particular place is no evidence of a contract of through transportation, but merely shows the destination of the car.

Herring v. Chesapeake & W. R. Co**Same—Liability of Carrier—Act of God.***

A carrier assumes all risks except those occasioned by the act of God or a public enemy, and, where a storm is the proximate cause of an injury, the carrier is excused.

Same—Same—Same—Delay in Shipment—Remote and Proximate Cause.*

Though a carrier was responsible for delay in shipment of stock at New Orleans, it cannot be held liable to the consignor in damages resulting from injury to his stock, the proximate cause of which was exposure to a severe storm that began after the stock left New Orleans.

Appeal from Circuit Court, Rockingham County.

Bill by the Chesapeake & Western Railroad Company against H. G. Herring and others. Decree for plaintiff, and defendant Herring appeals. Affirmed.

Herring & Herring and Geo. G. Grattan, for appellant.

Sipe & Harris, T. N. Haws, and Henry H. Downing, for appellee.

CARDWELL, J. The Chesapeake & Western Railroad Company, the terminal carrier, filed its bill to enforce its lien for transportation charges on a car load of horses shipped by appellant, H. G. Herring, from Albany, Tex., to Bridgewater, Va., the amount claimed being \$260.50 for transportation charges and \$47.75 for feed charges, aggregating \$308.25. The Norfolk & Western Railroad Company, the Southern Railroad Company, the Louisville & Nashville Railroad Company, and the Texas & Pacific Railroad Company, all connecting carriers, over whose lines the stock passed, were made defendants along with the appellant.

Appellant filed his answer to the bill, alleging that he contracted with the Texas Central Railroad Company (the initial carrier, but not a party to the suit) to transport his stock from Albany, Tex., to Harrisonburg, Va., for the rate of \$250.50, and not \$260.50, the rate demanded at Bridgewater; that by reason of unjustifiable delay at various points—particularly of four days, or a little more, at New Orleans—the stock was exposed to the jury of the unprecedented cold and snowstorm of February, 1899, as a result of which four of his very finest horses died, worth at the very lowest estimation \$425, and he had to pay \$43 in cash for feed and other things; which damages he claimed the right to set off “against any claim of the Texas Central, the Texas & Pacific, and the Louisville &

*As to whether a common carrier is liable for loss of or injury to freight from weather conditions, see monograph appended to *Carter v. Wilmington & W. R. Co.* (N. Car.), 1 R. R. R. 131, 24 Am. & Eng. R. Cas., N. S., 131; *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), 3 R. R. R. 1, 26 Am. & Eng. R. Cas., N. S., 1 (liability for conversion of wheat destroyed by unusual storm during delay in carriage and delivery); notes, 5 Am. & Eng. R. Cas., N. S., 79 (whether flood an act of God); *Missouri, K. & T. Ry. Co. v. Truskett* (Ind. Ter.), 17 Am. & Eng. R. Cas., N. S., 273 (heavy dew not an act of God excusing delay); *St. Louis, I. M. & S. R. Co. v. Bland* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 423; *Chesapeake & O. R. Co. v. American Exch. Bank* (Va.), 3 Am. & Eng. R. Cas., N. S., 424 (whether storm excuse for not feeding).

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Nashville Railroad Companies, or either of them, in this cause," none of which companies were making any claim against which the set-off could be allowed, having each been paid their respective charges on the shipment of his stock by the succeeding connecting carrier, according to the usual custom of railroad companies.

This answer, though it did not pray to be treated as a cross-bill, was, in the decree appealed from, so treated as to the Louisville & Nashville Railroad Company, against which company the blame for the delay in sending forward the stock was alleged.

The Louisville & Nashville Railroad Company answered the original bill filed by the Chesapeake & Western Railroad Company, and in its answer also answered the allegations of the answer and cross-bill of appellant, denying the alleged contract for the transportation of his stock from Albany, Tex., to Harrisonburg, Va., at the rate of \$250.50; denying that there was any contract at all for the through shipment of the stock until the contract with the respondent (Louisville & Nashville Railroad Company), exhibited with its answer made at New Orleans, February 7, 1899; denying any blame or responsibility for the alleged delay of four days at New Orleans; and alleging that no damage or injury was suffered by the stock while on the respondent's line or in its pens.

Upon the hearing of the cause on the pleadings, the exhibits therewith, and the depositions of witnesses, the circuit court decreed in favor of the Chesapeake & Western Railroad Company against the appellant for the amount of its claim, \$308.25, with interest thereon from February 18, 1899, and costs, and dismissed, with costs to the Louisville & Nashville Railroad Company, the cross-bill of the appellant setting up his claim for damages to his stock which he asked to be set off against the interest of the Texas Central, the Texas & Pacific, and the Louisville & Nashville Railroad Companies, or either of them, in the recovery by the Chesapeake & Western Railroad Company in this cause. We are asked to review and reverse the decree in so far as it denied the right of appellant to set off the claim asserted in his answer and cross-bill against the interest of the Louisville & Nashville Railroad Company in the recovery made by the Chesapeake & Western Railroad Company and dismissing appellant's bill.

The first question presented is whether or not the amount involved in the appeal is sufficient to confer jurisdiction upon this court. It is true that the appellant, after setting out his damages to be the value of four of his best horses, worth at least \$425, and \$43 for feed and other things, only adds, "and other damages to the amount of \$50 by reason of injury to the horses which did not die"; but, if this latter claim of damage should be disregarded because too vaguely made, the claim of damage to the amount of \$468 is sufficiently made, and, if appellant was entitled to recover that amount at all,

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he was certainly entitled to recover interest thereon from the time his answer and cross-bill was filed at the 2d April rules, 1899, until paid; and the interest computed on the \$468 from that date to the date of the decree appealed from, April 18, 1901, would, together with the \$468, amount to more than the sum necessary to confer upon this court jurisdiction.

It appears that the appellant, who was then living in Texas, and desiring to move to Bridgewater, Va., his future home, delivered a car load of horses to the Texas Central Railroad Company at Albany, Tex., on or about January 31, 1899, for shipment to Bridgewater, Va., he to accompany and care for the stock en route, the initial carrier furnishing him free transportation over its line from Albany to Cisco, Tex., where the stock was turned over to the connecting carrier, the Texas & Pacific Railroad Company, which latter carrier delivered the stock at New Orleans on February 3, 1899. When the stock arrived at New Orleans, the appellant, not having a through rate of freight thereon to Bridgewater, Va., sought to obtain such a rate from the Louisville & Nashville Railroad Company, and upon being told that the company had no through rates to Bridgewater, Va., but would send forward the stock on the regular charges of freight on stock in car-load lots to the point of connection with the Southern Railway, where a through rate might be obtained, appellant chose to wait at New Orleans for an offer from the Louisville & Nashville Railroad Company of a through rate, which, as he was made to understand, would require some time to arrange, and his stock was unloaded and placed in the pens of the railroad company. As soon as the company arranged with the connecting carriers for a through rate on the stock to Bridgewater, Va., it assumed the prior charges due to the Texas Central and the Texas & Pacific Railroad Companies, amounting to \$133, entered into the contract with the appellant of February 7th, and sent forward his stock that afternoon. After the stock had left the line of the Louisville & Nashville Railroad Company, it encountered the severe cold and snowstorm which prevailed from about the 10th to the 18th of February, 1899. During the time that the stock was delayed in New Orleans, as well as throughout the journey from Albany, Tex., to Bridgewater, Va., it was in the immediate charge of the appellant, and he was furnished free transportation by the several railroad companies for that purpose. He first made his claim to damages in this suit, founded upon a letter from the general freight and passenger agent of the Texas Central Railroad Company, dated prior to February 3, 1899, the date of the shipment of his stock, offering him a through rate to Harrisonburg, Va.; but this offer, as the court below held, he never accepted, and, on the contrary, entered into a contract with that company January 31, 1899, for the shipment of the stock to Cisco, Tex., where it was to be turned over to the connecting carrier, the Texas &

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Pacific Railroad, the contract specifying the charge of freight from Albany to Cisco, Tex., to be \$23, the shipper to release the initial carrier from any and all liability for injury to the stock after it left its own road.

It is shown that the fact that a car of live stock is waybilled to a particular place is no evidence of a contract for through transportation, but merely shows the destination of the car. *McConnell v. N. & W. Ry. Co.*, 86 Va. 248, 9 N. E. 1006.

It further appears by uncontradicted testimony that when appellant went to the agent of the Louisville & Nashville Railroad Company having in charge at the time the department of the road's management where contracts for the through shipment of this stock had to be made to see about rates, and this agent told him that he had no through rate to Bridgewater, but would let the stock go forward to some junction point on the line of the Louisville & Nashville Railroad Company to wait there for the rate, appellant refused to go forward, saying he preferred to wait there, where his stock was well cared for, until the rate was obtained. Had this proposal been accepted by appellant, his stock would have reached Calera, Ala., the junction with the Southern Railway, at least two days earlier, which, with the necessary delay at New Orleans for feeding and resting, would have about removed the cause of delay in New Orleans of which he complains. The appellant nowhere in his answer and cross-bill alleges that the stock was injured or weakened by standing in the pens at New Orleans, and it is shown in the evidence that the stock was in good condition when it left the pens of the Louisville & Nashville Railroad Company at New Orleans. No witness—not even the appellant himself, who was with the stock all the time, as we have said—testifies that the stock had been in the slightest degree injured, damaged, or weakened when it left New Orleans. Therefore it is manifest that the injury to his stock, of which he complains, was not traceable to the delay at New Orleans, a part of which was, as we have seen, uncontrollable, and the greater part of which was the result of his own choice.

This brings us to the remaining question—whether or not the Louisville & Nashville Railroad Company can be held liable to appellant for damages resulting to his stock from the severe snowstorm following the departure of the stock from New Orleans on the afternoon of February 7th. The snowstorm, encountered by the appellant about the 11th or 12th of February, is shown to have been the severest, both as to low temperature and the depth of the snow, that had been experienced in 27 years previous, causing to appellant at least two days' delay at two or more points before reaching Bridgewater, Va., of which delay he does not complain.

“A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss

by the act of God is the case of loss by flood or storm. Now, when it is shown that the damage resulted from this cause, immediately he is excused." *Railroad Company v. Reeves*, 10 Wall. 176, 19 L. Ed. 909, and authorities cited, among which is *Denny v. N. Y. Cent. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645. In that case it was shown that the defendants were guilty of a negligent delay of six days in transportation, by reason of which the shipment was overtaken by flood in the Hudson river, and for damages resulting to the goods shipped the action was brought, the contention of the plaintiff being that the defendant was liable because of the negligent delay of six days in transportation, whereby the goods were overtaken by the flood; but the court held that, the flood being the proximate cause of the injury, and the delay in transportation the remote cause, the plaintiff was not entitled to recover.

In the examination of the appellant in his own behalf in this case he was asked: "As I understand your contention in this case, so far as the question of damages is concerned, it is based on the idea that the delay on the route before you struck the storm caused your stock to be exposed to the snow-storm and cold that commenced about the 11th or 12th of February, 1899, as a result of which exposure they contracted pneumonia or other forms of cold, and died, and that, but for such antecedent delay, they would have reached Bridgewater before the storm, and been safe?" His answer was, "Yes." Here he brings his case clearly within the rule laid down in *Railroad Co. v. Reeves* and *Denny v. N. Y. Cent. R. Co.*, supra, that the storm is to be regarded as the proximate cause of the injury and the delay in transportation the remote cause. Therefore, even if the Louisville & Nashville Railroad Company could be held responsible for the delay at New Orleans, which, as we have seen, the evidence does not warrant, it cannot be held liable to the appellant in damages resulting from injury to his stock, the proximate cause of which was exposure to the severe storm and cold that commenced after the stock had departed from New Orleans.

"The law refers an injury to the proximate cause, and not to the remote cause. A man guilty of negligence is not responsible for all the consequences that may or do flow therefrom, but only for such consequences as a prudent and experienced man, fully acquainted with all the circumstances which in fact exist at the moment, could have foreseen or reasonably anticipated." *Fowlkes v. Southern Ry. Co.*, 96 Va. 742, 32 S. E. 464; *Connell's Ex'rs v. C. & O. R. R. Co.*, 93 Va. 57, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786.

Upon the whole case we are of opinion that the decree appealed from should be affirmed.

ALABAMA & V. R. Co. v. J. M. & C. B. POUNDER.*(Supreme Court of Mississippi, Oct. 19, 1903.)*

[35 So. Rep. 155.]

Carriers of Freight—Delay in Shipment—Pleading.

The declaration in an action against a carrier, averring an unreasonable and long delay in the shipment of freight, and that this was negligence in the carrier, is sufficient, without further detailing the facts.

Same—Same—Failure to Notify Consignee's Agent.

The delay of a carrier is "in the shipment of freight," as alleged in a declaration, though occurring after arrival; the consignee not being notified of the arrival, as required by a universal and well-understood custom.

Same—Same—Same.*

Though a carrier notified by mail the consignee of the arrival of a car of freight, it was negligent in not notifying one well known to it to be the agent and representative of the consignee, and who daily called and asked for a car containing such freight consigned to such consignee; and this though he asked for a car of a certain number, while the freight, to the knowledge of the carrier, had been transferred to a car of another number.

Variance.

Though in an action against a carrier by a consignee of freight for the difference between what the consignee paid for it and what he had to sell it for, because of the delay in shipment, there is a variance between the declaration and proof as to whom he sold it, this cannot be complained of for the first time on appeal.

Appeal from Circuit Court, Hinds County; Robt. Powell, Judge.

"To be officially reported."

Action by J. M. & C. B. Pounder against the Alabama & Vicksburg Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

McWillie & Thompson, for appellant.

Watkins & Easterling, for appellees.

TRULY, J. This case was tried in the court below before the judge, a jury being waived. So far as material to the decision of this litigation, the facts are as follows: On August 8, 1901, Mitchell & Co., who were the sales and distributing agents of the appellees, Pounder, effected a sale of a quantity of cotton ties at \$1.18 per bundle. The appellees ordered these shipped, and accordingly 1,000 bundles of ties were shipped from Charlotte, N. C., on the 19th of August, 1901, and delivered to the Seaboard Air Line Railroad Company, and shipped in Seaboard Air Line car No. 11,155, and consigned to J. M. & C. B. Pounder, at Jackson, Miss., to

*As to whether it is the duty of a carrier to give notice of arrival of freight at destination, see note, 20 Am. & Eng. R. Cas., N. S., 461 (whether notice to consignee of arrival of goods is essential to the termination of liability as carrier); *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103; *Alabama Mid. Ry. Co. v. Darby* (Ala.), 13 Am. & Eng. R. Cas., N. S., 105.

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shippers' order, draft and bill of lading attached, sent to one of the banks in Jackson, to be taken out on receipt of goods by Mitchell & Co. Car No. 11,155 was damaged in transit, and on the 23d of August, 1901, the Mobile & Ohio Railroad Company, at Montgomery, refused to accept that car, and thereupon the ties were reloaded in Seaboard Air Line car No. 16,071, but the Mobile & Ohio Railroad Company accepted this car under the original waybill. When car No. 16,071 reached Meridian, the Alabama & Vicksburg Railroad Company, appellant, refused to accept the car under the defective waybill, and demanded that it should be corrected. This was done, and the car No. 16,071 reached Jackson on the 31st of August, 1901, the same day that it was received by the appellant company at Meridian. According to the well-established and undisputed custom of the railroad company, and in its usual course of business, which requires the consignee to be notified of the receipt of freight, the railroad agent notified J. M. & C. B. Pounder by postal card, through the mail, but did not notify Mitchell & Co., who were known to the railroad to be the agents and representatives of appellees. On each day from September 1st to September 6th Mitchell asked, in person, at the depot of appellant, whether car No. 11,155, loaded with cotton ties for Pounder, had been received. The answer in each case was that it had not. Mitchell also testifies that he asked the agent of the company if there were any other ties for Pounder, and received the same reply. The proof showed further that the sale of the ties had been effected to various parties by Mitchell & Co. at the figure named heretofore, to wit, \$1.18 per bundle, but that, on account of the delay in the shipment, the price of ties had declined to such an extent that Mitchell's vendees refused to accept. It further appears that, if the ties had been received by Mitchell on or prior to September 5th, he could have disposed of the ties at the figures named. Upon the trial it developed that when Mitchell, by his own examination of the cars upon the track, found the car No. 16,071, he immediately made an investigation, which resulted in a few hours in ascertaining the cause of the mistake, but this discovery was made too late to carry out the sale as originally made. One of the members of the firm of Pounder came to Jackson shortly thereafter, and succeeded in disposing of the ties, through Mitchell & Co., at 92½ cents per bundle. A judgment was given for \$250 for plaintiffs, this being the difference between \$1.18, the original price agreed upon, and 92½ cents, the price which Pounder was able to obtain in the open market, all other claims for damages being disallowed. On the trial before the judge, all the facts were thoroughly investigated, and were decided by him adversely to the railroad company. On appeal, three points are urged as error:

First. It is contended that the demurrer to the declaration should have been sustained, because of the failure to state the

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facts upon which the negligence of the railroad company is based. We think that the demurrer was not well taken, and was therefore properly overruled. It is not necessary that the declaration should detail the evidence by which the plaintiff expects to make out his case. The declaration avers an unreasonable and long delay in the shipment of the ties, and that this was negligence in the railroad company, and that damages to plaintiffs resulted therefrom. We think this charge, together with other facts set out in the declaration, sufficient in the case at bar.

Second. It is urged that the delay complained of was not in the shipment, but after the freight arrived at its destination, and therefore, under this declaration, the railroad company is not liable. It is true that, in point of fact, the delay occurred at the depot in Jackson after the car arrived here, but we prefer to align ourselves with those authorities which hold that the duty of the carrier is not completed until the consignee has been notified of the arrival of the freight. More especially is this the rule where, as in this case, a universal and well-understood custom to that effect is in force. Upon that branch of the case, the case of New Orleans, J. & G. N. R. Co. v. Tyson, 46 Miss. 729, is decisive. It is contended by counsel for appellant that, even recognizing this rule, still it was complied with in this case by the notification which was sent by mail to Pounder. We think not. The fact that Mitchell, who was known to be the agent of Pounder, daily asked for the cars of ties consigned to Pounder, was sufficient to put the railroad company on notice, and it was negligence in its agents not to have notified him that a car of ties was there, consigned to Pounder. The appellant cannot shield itself with the argument that there was a difference in the number of the car for which Mitchell asked and the car which had been actually received in Jackson. The ties were the material thing that Mitchell was inquiring about. The car was simply the vehicle in which they were expected to arrive. Especially was it negligence in the railroad company not to inform Mitchell that the car had arrived, because the company had actual knowledge, through its agent at Meridian, that this was the same shipment of ties that had originally been shipped in car No. 11,155, and the railroad company had actual knowledge of the change of cars containing the shipment, because the waybill had been corrected, at its demand, to show the change. Undoubtedly, therefore, it was negligence of the railroad company which produced any loss entailed upon Pounder.

The third proposition which is contended for by counsel for appellant is that the declaration avers that the sale was made by Pounder to Mitchell, while the proof upon the trial showed—so they contend—that the sale was made not to Mitchell, but by and through Mitchell & Co., as the sales agents and representatives of Pounder. Granted that this is

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so; how can it affect the liability of the railroad company? The point at issue is not to whom the sale was made, but were Pounder & Co. damaged by the negligence of the appellant? If it be granted that there was a variance between the allegation in the declaration and the proof upon the trial, the railroad company had its remedy at that time to plead variance; and, if it appeared that it had been misled in any wise, it is not to be doubted that the plaintiffs would have been allowed to have amended their declaration upon proper terms. Rev. Code, 1892, § 718. But the record shows that the appellant was not misled. The case was fought out upon its merits. The point on a variance cannot now be raised for the first time. Greer v. Bush, 57 Miss. 576. The judge found the facts against the appellant, and we find no error in the law.

The judgment is affirmed.

 LYMAN v. SOUTHERN RY. CO.

(*Supreme Court of North Carolina, June 2, 1903.*)

[44 S. E. Rep. 550.]

Warehousemen—Loss of Goods—Fire—Res Gestæ.*

In an action against a warehouseman for loss of goods stored, by the destruction of the warehouse by fire which did not originate in the warehouse, evidence of a witness, who arrived some 15 or 20 minutes after the fire had started, concerning what certain other persons, unknown to witness, stated concerning the fire in witness' presence, was inadmissible as res gestæ.

Evidence.

Where a fire did not originate in a warehouse, a question asked of a witness as to how long, judging from the condition of the warehouse, the fire had been burning when the fire company got there, was incompetent.

Same—Declarations of Agent.

In an action against a warehouseman for the loss of goods by the burning of a warehouse, a declaration of defendant's agent made a few days after the fire was inadmissible.

Warehousemen—Loss of Goods—Negligence—Presumptions.

In an action against a warehouseman for loss of goods, sustained by the burning of the warehouse, the fact that the goods were destroyed by fire raised no presumption of negligence on the part of the warehouseman.

Same—Same—Same—Sufficiency of Evidence.†

In an action against a warehouseman for loss of goods, sustained by the burning of a warehouse, evidence *held* insufficient to show that defendant failed to exercise ordinary care to save the warehouse and the goods stored therein from destruction.

Douglas, J., dissenting.

*As to declarations of railroad employees as res gestæ, see foot-note appended to *Kansas City Southern Ry. Co. v. Moles* (C. C. A.), 8 R. R. R. 22, 31 Am. & Eng. R. Cas., N. S., 22.

†As to the liability of a railroad, as warehouseman, for loss of goods by fire, see note appended to *Walker v. Eikleberry* (Okla.), 13 Am. & Eng. R. Cas., N. S., 253; *Backhaus v. Chicago & N. W. R. Co.* (Wis.), 3 Am. & Eng. R. Cas., N. S., 426; *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103.

Lyman v. Southern Ry. Co

Appeal from Superior Court, Buncombe County; M. H. Justice, Judge.

Action by T. B. Lyman against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

F. W. Thomas and Luther & Wells, for appellant.

Tucker & Murphy and A. B. Andrews, Jr., for appellee.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of the value of certain personal property in the warehouse of the defendant at Asheville, N. C., destroyed by fire on October 27, 1894. "The plaintiff did not contend that the defendant was liable as a common carrier, but sought to hold it liable as warehouseman." The material facts proved by the plaintiff, and, for the purpose of the decision of the case, taken to be true, are: The plaintiff delivered to the defendant at Raleigh, N. C., on October 12, 1894, the property destroyed as above stated, for shipment to Asheville, N. C.; being a marble bust of the plaintiff's father, of the value of \$400, a pedestal for the bust, a table, and an ebony chair. The goods arrived safely at Asheville, and were kept in the defendant's warehouse, with the understanding that the plaintiff would pay the company for storing them for him. When he applied for the property, he was told by the defendant's agent that it had been destroyed by the fire which burned the warehouse on the morning of October 27, 1894. The plaintiff showed by several witnesses that they were members of the fire company, and when they reached the scene of the fire the north end of the warehouse and several cars near the warehouse were burning. The defendant's agent cautioned the firemen to be careful, saying that there were explosives. Did not say where they were. Witnesses heard two or three small explosions, but did not know where they were. The cars were burning 25 or 30 yards from the depot. Heard an explosion outside. The firemen put two streams of water on the fire. There was a strong wind blowing up the river. The fire company got to the fire 15 or 20 minutes after the alarm was sounded. Fire spread to the cars on the track. There were explosions 75 feet from where they were at work. The nearest car was 50 feet from the depot. The fire company was efficient. There was a hydrant within 200 feet of the depot. The warehouse was nearly burned up before the explosion. It is about one mile from the fire department to the depot. The fire had not reached the warehouse when the fire company got there. Fire in cars at the time, and a strong wind blowing towards the warehouse. There was an explosion in one car after the fire company got there, but it did not deter the firemen. The railroad company had no apparatus about its warehouse for extinguishing fire or turning water on it. The warehouse could have been saved if it had not been for the wind. Fire was first discovered in the

building near the warehouse, connected with the warehouse by a shed. The defendant had some barrels in the warehouse, which were supposed to be kept full of water, with buckets connected. There was no evidence that water was in these barrels at the time, nor hose and other apparatus usually kept in hotels and other large buildings. There were water connections close to the warehouse. The defendant demurred to the evidence, and moved to nonsuit the plaintiff. The motion was allowed, and the plaintiff excepted and appealed.

The witness Gennett said that he heard some men talking about the fire at the time, but did not know or remember who they were. The plaintiff asked the witness to state what these men said about the fire and its origin. The defendant objected. Objection sustained, and plaintiff excepted. The question was clearly incompetent. The fire had been burning some 15 or 20 minutes when the witness got there. Any statement made after that interval by persons unknown to the witness could not be a part of the *res gestæ*, and was not otherwise competent. The exception cannot be sustained.

Jesse Patton was asked, "How long, judging from the condition of the warehouse when the fire company got there, had the fire been burning?" Upon the defendant's objection, the question was ruled out, and the plaintiff excepted. The question was not competent. The fire did not originate in the warehouse, and its condition at the time the witness reached there was no evidence as to the time the fire begun. The witness proceeded without objection to describe the condition of the warehouse when he got there. The ruling of his honor was correct.

The plaintiff proposed to ask the same witness in regard to declarations of Clark, the defendant's agent, made a few days after the fire. This was, upon objection, excluded. It is well settled that the declarations of an agent made after the transaction are not admissible. *Southerland v. R. Co.*, 106 N. C. 105, 11 S. E. 189.

It is conceded that the defendant held the goods destroyed as warehouseman. Ever since the case of *Coggs v. Bernard*, *Ld. Raym.* 909, *Smith's L. C.* 354, which Mr. Smith says "is one of the most celebrated cases ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well-ordered exposition of the English law of bailments," the measure of duty owing by bailees in regard to the several kinds of bailment has been settled. The only duty devolving upon the courts has been to apply the principles announced by Lord Holt to the facts in the cases as they arise. "As to the responsibility of the present bailee [warehouseman], ordinary or average diligence is required. This is such care and diligence as prudent persons of the same class are wont to exercise towards such property, or in the management of their own property under like circumstances.

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For failure to exercise this degree of care and diligence, the bailee must respond." Smith, L. C. vol. 1 (9th Ed.) 414; Jones on Bailments, 97; Hale on Bailments & Carriers, 238. "The burden of proof is on the plaintiff to show negligence." Id. 239. The fact that the goods are destroyed by fire raises no presumption of negligence on the part of the bailee. This court, in Neal v. Railroad, 53 N. C. 482, by Manly, J., says, "Ordinary care is what is required, and this is defined by a recent elementary treatise [Story on Bailments, § 41] to be 'that which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" Turrentine v. Railroad, 106 N. C. 375, 6 S. E. 116, 6 Am. St. Rep. 602; Daniel v. Railroad, 117 N. C. 603, 23 S. E. 327.

Applying these principles to the facts in this case, we concur in the ruling of his honor. The only suggestion of negligence is that there was in the warehouse, or in some cars near by, some explosives, which rendered it dangerous for the firemen to go into or near enough to the warehouse to stop the fire. It does not appear what the explosives were, where they were, or how long they had been in or near the warehouse. One of the plaintiff's witnesses says that they would have saved the warehouse but for the strong wind; another, that the "fire company was efficient." There is no testimony tending to show that the explosives caused the fire. The nearest approach to evidence as to the location of the explosives was that there was an "explosion in one car soon after the fire company got there, but it did not deter the firemen." There was a hydrant within 200 feet of the fire. Another witness said there were two hydrants near the warehouse. The firemen put two streams of water on the fire.

Without pursuing the discussion, we are of the opinion that the judgment was correct, and must be affirmed.

DOUGLAS, J., dissents.

OHIO COAL CO. v. WHITCOMB *et al.*

(Circuit Court of Appeals, Seventh Circuit, April 14, 1903.)

[123 Fed. Rep. 359.]

Carriers—Discriminative Charges—Joint Use of Terminal Track.

Along the docks in a city was a railroad track called the "Bay Front Track," one part owned by defendant, and connecting with its main line, and the other part by another railroad company, and connected with its line, and connecting spurs from which reached the several docks. By an agreement between the two companies the entire track was used jointly, each maintaining its own portion: *held*, that such agreement made the entire track a part of defendant's terminals, and that an extra charge of \$2 per car, made to one shipper from a point on the docks, in addition to the published schedule of rates from the city, where no extra charge was made to any other shipper, was discriminative.

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Same—Agreement to Pay Discriminative Charges—Estoppel.

An agreement by a shipper to pay a discriminative charge enacted by a railroad company in order to obtain service to which it was legally entitled without such charge, and with an express stipulation that it thereby waived none of its legal rights, does not estop it from maintaining a suit to recover back the sum so paid.

Same—Charge for Operating Private Side Track—Wisconsin Statute.

Rev. St. Wis. 1898, § 1802, which gives a railroad company, thereby required to maintain and operate private side tracks connecting with its lines, and extending to elevators, warehouses, etc., the right to charge the actual cost of maintaining and operating such track, to be paid monthly by the owner, does not justify a company in making an arbitrary charge per car in addition to the scheduled rates for all cars loaded on and taken from such side track, without any reference to the actual cost of maintenance and operation of the track.

Railroads—Action against Receivers.

Where, on sale of a railroad in foreclosure, the purchaser is required by the decree to pay all liabilities of the receivers remaining unpaid, the court retains jurisdiction to determine such liabilities and enforce payment, and an action may be maintained against the receivers to establish such a liability, although the receivership has been terminated, and the property turned over to the purchaser.

Jenkins, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The Ohio Coal Company, plaintiff in error, a corporation existing under the laws of the State of Minnesota, was at the time of the transactions in suit, a wholesale dealer in coal, having certain docks at Ashland, Wisconsin. The defendants, receivers of the Wisconsin Central Railroad Company, and the Wisconsin Central Company, corporations existing under the laws of the state of Wisconsin, were operating certain lines of railroad from Ashland throughout the state of Wisconsin, and into adjoining states. The action was brought by plaintiff in error to recover damages for unjust discrimination and undue preference, principally on account of a certain charge of two dollars per car exacted from the coal company, in addition to the public tariff rate from Ashland to points of destination; such extra charge not being asked, or received from other shippers from Ashland.

The facts are substantially as follows: Along the shore of Lake Superior in the city of Ashland, connected by switches with nearly all the docks in the city, is a track known as the "Bay Front track." Its westerly end is connected with, and forms a part of, the Chicago, St. Paul, Minneapolis & Omaha Railroad Company's railroad. Its easterly end is connected with, and forms a part of, the Wisconsin Central Railroad Company's railroad. It is used jointly by both roads under an agreement, whereby each company is granted the right to run over the track of the other their freight cars, empty or loaded, moved by their own engines, handled by their own train crew, under such rules and regulations as are from time to time agreed upon; each company to pay the other, for every loaded or partly loaded car thus moved, the sum of fifty cents. Each company agreed at its sole cost, to

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keep the tracks thus owned by it, the joint use whereof is stipulated, in safe and proper condition; to construct and maintain all necessary spur and side tracks to the mills and industries reached by this track; to assume all risk for persons or property damaged by its own trains upon the track of the other; and to share the rights of joint use thus acquired with no other transportation company entering the city of Ashland. The point on the Bay Front track that separated these two portions of the track—one owned in fee by the Omaha Company, and the other by the Wisconsin Central Company—was in what was known as block 70, Vaughn's Division of the city of Ashland.

The agreement thus made on the 12th of September, 1885, continued down to, and included the transactions upon which the action was brought, each railway during that time operating over the Bay Front track under the agreement, except for a short period when the agreement was suspended.

The only coal shippers tributary to this Bay Front track—indeed the only wholesale coal dealer in the city—were the Ohio Company, occupying a dock about three-fourths of a mile west of the division point named, and another company, the tenant of the Wisconsin Central Railroad, occupying a dock east of such point. Tributary to this track, however, both ways from the point named, were various shipping industries, such as ore, stone, salt, cement, building material, lumber, logs, and the like. All of these docks, including the docks of the two coal companies, were connected with the Bay Front track by switches or spurs. All these industries, except the Ohio Coal Company, irrespective of their situation east or west of the division point named, were served by the roads without difference or discrimination in either charges or facilities.

The shipments of coal from both coal companies was largely to the Gogebic regions, and was carried on principally in ore cars, containing ten tons—all of the thirty-seven hundred and eighty-two cars constituting the subject matter of this suit, except one hundred and fifty, being such ore cars. Though no charge additional to the published tariff (fifty-five cents a ton to all points on the Iron Range), was made to the other coal company, a charge of two dollars a car was imposed upon and collected from the Ohio Coal Company. On protest of the Ohio Company, all service to it was for a time suspended; but subsequently negotiations were entered into, resulting in a restoration of the service at the extra charge of two dollars per car, including the setting in of the cars upon the Ohio Company's dock—a distance of about eighteen hundred feet from the Bay Front track—and the bringing of them out to the freight yard, to be made up in the trains. This arrangement was brought about by the two telegrams following, the first sent by the receiver to the Coal Company, the second being the coal company's reply.

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“Milwaukee, September 5th, 1896.

“Ohio Coal Co., St. Paul, Minnesota. Referring to conversation with Mr. Boyesen yesterday, our people will, if you desire, switch cars for you at your present dock, at two dollars per car. No charge for empties. Subject to demurrage charge in case of delay and subject further to be determined at our pleasure, all without prejudice to existing relations of parties.
(Signed) Howard Morris.”

“St. Paul, 9-5, 1896.

Howard Morris, Milwaukee, Wis.

Proposition in your telegram satisfactory with the further understanding that in making such payments for switching service we waive none of our legal rights. When can we expect service?
(Signed) Ohio Coal Co.

J. E. McWilliams,
Vice-President.

Previous to this, the Ohio Coal Company had intervened in the receivership suit in the Eastern District of Wisconsin to obtain an order to restore service by the receivers, but after the arrangement above set forth, its petition was not further prosecuted.

Before the trial in the Circuit Court, the action was dismissed against the defendants as receivers of the Wisconsin Central Company, leaving them in as receivers of the Wisconsin Central Railroad Company, and at the conclusion of the evidence, a verdict was entered by direction of the court, in favor of the defendants. From the judgment entered on this verdict, the writ of error is prosecuted.

The further facts are stated in the opinion of the court.

P. J. McLaughlin and A. E. Boyesen, for plaintiff in error,
Wm. F. Vilas, for defendants in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the Court.

The agreement of September 12, 1885, under which the Wisconsin Central Railroad Company, and its receivers, operated their road in the city of Ashland, made in our opinion the Bay Front track an integral part of the Wisconsin Central's terminals. True, the Wisconsin Central had no title in fee to the roadbed west of the division point named. But the grant under the agreement was, for the purposes of a terminal, as complete as if it were in fee simple, or leasehold. The limitation on the grant was important as between the railroads individually, but, as between the railroads collectively and the public, the agreement simply gave to the roads more extended terminal facilities. The published tariffs from Ashland to outside points must be held—at least

ALABAMA & V. R. Co. v. J. M. & C. B. POUNDER.

(Supreme Court of Mississippi, Oct. 19, 1903.)

[35 So. Rep. 155.]

Carriers of Freight—Delay in Shipment—Pleading.

The declaration in an action against a carrier, averring an unreasonable and long delay in the shipment of freight, and that this was negligence in the carrier, is sufficient, without further detailing the facts.

Same—Same—Failure to Notify Consignee's Agent.

The delay of a carrier is "in the shipment of freight," as alleged in a declaration, though occurring after arrival; the consignee not being notified of the arrival, as required by a universal and well-understood custom.

Same—Same—Same.*

Though a carrier notified by mail the consignee of the arrival of a car of freight, it was negligent in not notifying one well known to it to be the agent and representative of the consignee, and who daily called and asked for a car containing such freight consigned to such consignee; and this though he asked for a car of a certain number, while the freight, to the knowledge of the carrier, had been transferred to a car of another number.

Variance.

Though in an action against a carrier by a consignee of freight for the difference between what the consignee paid for it and what he had to sell it for, because of the delay in shipment, there is a variance between the declaration and proof as to whom he sold it, this cannot be complained of for the first time on appeal.

Appeal from Circuit Court, Hinds County; Robt. Powell, Judge.

"To be officially reported."

Action by J. M. & C. B. Pounder against the Alabama & Vicksburg Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

McWillie & Thompson, for appellant.

Watkins & Easterling, for appellees.

TRULY, J. This case was tried in the court below before the judge, a jury being waived. So far as material to the decision of this litigation, the facts are as follows: On August 8, 1901, Mitchell & Co., who were the sales and distributing agents of the appellees, Pounder, effected a sale of a quantity of cotton ties at \$1.18 per bundle. The appellees ordered these shipped, and accordingly 1,000 bundles of ties were shipped from Charlotte, N. C., on the 19th of August, 1901, and delivered to the Seaboard Air Line Railroad Company, and shipped in Seaboard Air Line car No. 11,155, and consigned to J. M. & C. B. Pounder, at Jackson, Miss., to

*As to whether it is the duty of a carrier to give notice of arrival of freight at destination, see note, 20 Am. & Eng. R. Cas., N. S., 461 (whether notice to consignee of arrival of goods is essential to the termination of liability as carrier); *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103; *Alabama Mid. Ry. Co. v. Darby* (Ala.), 13 Am. & Eng. R. Cas., N. S., 105.

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shippers' order, draft and bill of lading attached, sent to one of the banks in Jackson, to be taken out on receipt of goods by Mitchell & Co. Car No. 11,155 was damaged in transit, and on the 23d of August, 1901, the Mobile & Ohio Railroad Company, at Montgomery, refused to accept that car, and thereupon the ties were reloaded in Seaboard Air Line car No. 16,071, but the Mobile & Ohio Railroad Company accepted this car under the original waybill. When car No. 16,071 reached Meridian, the Alabama & Vicksburg Railroad Company, appellant, refused to accept the car under the defective waybill, and demanded that it should be corrected. This was done, and the car No. 16,071 reached Jackson on the 31st of August, 1901, the same day that it was received by the appellant company at Meridian. According to the well-established and undisputed custom of the railroad company, and in its usual course of business, which requires the consignee to be notified of the receipt of freight, the railroad agent notified J. M. & C. B. Pounder by postal card, through the mail, but did not notify Mitchell & Co., who were known to the railroad to be the agents and representatives of appellees. On each day from September 1st to September 6th Mitchell asked, in person, at the depot of appellant, whether car No. 11,155, loaded with cotton ties for Pounder, had been received. The answer in each case was that it had not. Mitchell also testifies that he asked the agent of the company if there were any other ties for Pounder, and received the same reply. The proof showed further that the sale of the ties had been effected to various parties by Mitchell & Co. at the figure named heretofore, to wit, \$1.18 per bundle, but that, on account of the delay in the shipment, the price of ties had declined to such an extent that Mitchell's vendees refused to accept. It further appears that, if the ties had been received by Mitchell on or prior to September 5th, he could have disposed of the ties at the figures named. Upon the trial it developed that when Mitchell, by his own examination of the cars upon the track, found the car No. 16,071, he immediately made an investigation, which resulted in a few hours in ascertaining the cause of the mistake, but this discovery was made too late to carry out the sale as originally made. One of the members of the firm of Pounder came to Jackson shortly thereafter, and succeeded in disposing of the ties, through Mitchell & Co., at 92½ cents per bundle. A judgment was given for \$250 for plaintiffs, this being the difference between \$1.18, the original price agreed upon, and 92½ cents, the price which Pounder was able to obtain in the open market, all other claims for damages being disallowed. On the trial before the judge, all the facts were thoroughly investigated, and were decided by him adversely to the railroad company. On appeal, three points are urged as error:

First. It is contended that the demurrer to the declaration should have been sustained, because of the failure to state the

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facts upon which the negligence of the railroad company is based. We think that the demurrer was not well taken, and was therefore properly overruled. It is not necessary that the declaration should detail the evidence by which the plaintiff expects to make out his case. The declaration avers an unreasonable and long delay in the shipment of the ties, and that this was negligence in the railroad company, and that damages to plaintiffs resulted therefrom. We think this charge, together with other facts set out in the declaration, sufficient in the case at bar.

Second. It is urged that the delay complained of was not in the shipment, but after the freight arrived at its destination, and therefore, under this declaration, the railroad company is not liable. It is true that, in point of fact, the delay occurred at the depot in Jackson after the car arrived here, but we prefer to align ourselves with those authorities which hold that the duty of the carrier is not completed until the consignee has been notified of the arrival of the freight. More especially is this the rule where, as in this case, a universal and well-understood custom to that effect is in force. Upon that branch of the case, the case of New Orleans, J. & G. N. R. Co. v. Tyson, 46 Miss. 729, is decisive. It is contended by counsel for appellant that, even recognizing this rule, still it was complied with in this case by the notification which was sent by mail to Pounder. We think not. The fact that Mitchell, who was known to be the agent of Pounder, daily asked for the cars of ties consigned to Pounder, was sufficient to put the railroad company on notice, and it was negligence in its agents not to have notified him that a car of ties was there, consigned to Pounder. The appellant cannot shield itself with the argument that there was a difference in the number of the car for which Mitchell asked and the car which had been actually received in Jackson. The ties were the material thing that Mitchell was inquiring about. The car was simply the vehicle in which they were expected to arrive. Especially was it negligence in the railroad company not to inform Mitchell that the car had arrived, because the company had actual knowledge, through its agent at Meridian, that this was the same shipment of ties that had originally been shipped in car No. 11,155, and the railroad company had actual knowledge of the change of cars containing the shipment, because the waybill had been corrected, at its demand, to show the change. Undoubtedly, therefore, it was negligence of the railroad company which produced any loss entailed upon Pounder.

The third proposition which is contended for by counsel for appellant is that the declaration avers that the sale was made by Pounder to Mitchell, while the proof upon the trial showed—so they contend—that the sale was made not to Mitchell, but by and through Mitchell & Co., as the sales agents and representatives of Pounder. Granted that this is

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so; how can it affect the liability of the railroad company? The point at issue is not to whom the sale was made, but were Pounder & Co. damaged by the negligence of the appellant? If it be granted that there was a variance between the allegation in the declaration and the proof upon the trial, the railroad company had its remedy at that time to plead variance; and, if it appeared that it had been misled in any wise, it is not to be doubted that the plaintiffs would have been allowed to have amended their declaration upon proper terms. Rev. Code, 1892, § 718. But the record shows that the appellant was not misled. The case was fought out upon its merits. The point on a variance cannot now be raised for the first time. Greer v. Bush, 57 Miss. 576. The judge found the facts against the appellant, and we find no error in the law.

The judgment is affirmed.

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(*Supreme Court of North Carolina, June 2, 1903.*)

[44 S. E. Rep. 550.]

Warehousemen—Loss of Goods—Fire—Res Gestæ.*

In an action against a warehouseman for loss of goods stored, by the destruction of the warehouse by fire which did not originate in the warehouse, evidence of a witness, who arrived some 15 or 20 minutes after the fire had started, concerning what certain other persons, unknown to witness, stated concerning the fire in witness' presence, was inadmissible as *res gestæ*.

Evidence.

Where a fire did not originate in a warehouse, a question asked of a witness as to how long, judging from the condition of the warehouse, the fire had been burning when the fire company got there, was incompetent.

Same—Declarations of Agent.

In an action against a warehouseman for the loss of goods by the burning of a warehouse, a declaration of defendant's agent made a few days after the fire was inadmissible.

Warehousemen—Loss of Goods—Negligence—Presumptions.

In an action against a warehouseman for loss of goods, sustained by the burning of the warehouse, the fact that the goods were destroyed by fire raised no presumption of negligence on the part of the warehouseman.

Same—Same—Same—Sufficiency of Evidence.†

In an action against a warehouseman for loss of goods, sustained by the burning of a warehouse, evidence *held* insufficient to show that defendant failed to exercise ordinary care to save the warehouse and the goods stored therein from destruction.

Douglas, J., dissenting.

*As to declarations of railroad employees as *res gestæ*, see foot-note appended to *Kansas City Southern Ry. Co. v. Moles* (C. C. A.), 8 R. R. R. 22, 31 Am. & Eng. R. Cas., N. S., 22.

†As to the liability of a railroad, as warehouseman, for loss of goods by fire, see note appended to *Walker v. Eikleberry* (Okla.), 13 Am. & Eng. R. Cas., N. S., 253; *Backhaus v. Chicago & N. W. R. Co.* (Wis.), 3 Am. & Eng. R. Cas., N. S., 426; *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103.

the Omaha Company of \$1,886.00 in addition to the cost of a longer haul. I think the receivers were entitled to exact a reasonable compensation for the additional traffic (*Walker v. Keenan*, 73 Fed. 755, 19 C. C. A. 668; *Interstate Commerce Commission v. Chicago, Burlington and Quincy Railroad Company*, 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182); and that under the circumstances there can be no claim for unjust discrimination. There is no evidence in this record, as I read it, tending to show as matter of fact that the charge of \$2.00 per car was unreasonable. The price was the regular switching charge at Ashland, which one railway company exacted of another, and which the plaintiff was required to pay and did pay when it shipped over the Chicago & Northwestern Railway. The charge included the 50 cents per car which the Wisconsin Central Railroad paid to the Omaha road. The burden was upon the plaintiff to show that the additional sum was an unreasonable switching charge. Failing any such proof in this record, it is difficult to understand that the trial court could have ruled otherwise than it did upon this branch of the case.

With respect to the other branch, it cannot be said that there is just ground for the charge of discrimination. It is true that granting use of like tracks to some shippers and denying the use of them to others, the circumstances and conditions being substantially similar, constitutes unjust discrimination. But the other tenants of the docks, which were in part occupied by the plaintiff, were not in the same business, but dealt in lumber, lime, salt, cement, and like products. These products were a different class of goods from coal, paid higher rates of transportation, and with respect to them there was keener competition. The tariff freight on lumber was 16 cents per hundred pounds, on salt 6½ cents per hundred pounds, on cement 6½ cents, on lime 18 cents, on sewer-pipe 5 cents, while the freight on coal was 50 cents per gross ton. There was upon these docks no other dealer in coal. That the receivers made no switching charge to these other industries cannot avail the plaintiff; for, in view of the character of the freight and the competition with other roads, it could properly waive the charge without the imputation of discrimination against the plaintiff. There was therefore no discrimination under the statute, so that the only question remaining is whether the charge was reasonable or unreasonable. In so far as it was unreasonable, the plaintiff could, probably, under the statute which it invoked, recover to the extent that it was unreasonable, and, the proof therein failing, I think the trial court was correct in directing a verdict.

CHICAGO, R. I. & P. RY. CO. v. COLBY.

(Supreme Court of Nebraska, July 3, 1903.)

[96 N. W. Rep. 145.]

Carriers of Freight—Rules and Regulations.

A railroad company, as a common carrier, may make reasonable rules and regulations for the reception, carriage, and delivery of freights, including the classification and suitable preparation of articles for shipment; and such rules and regulations, shippers are to conform to.

Questions of Law.

The reasonableness of such rules, regulations, and classification is a question of law for the court, and it is reversible error to submit that question to the jury.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Gage County; Letton, Judge.

Action by David R. Colby against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

W. F. Evans and Hazlett & Jack, for plaintiff in error.
L. W. Colby, for defendant in error.

BARNES, C. In this action D. R. Colby, the defendant in error, sought to recover the possession of a certain wagon, described in his petition, for the Chicago, Rock Island & Pacific Railway Company. Such proceedings were had that the case finally reached the district court of Gage county, where, on a trial to a jury, a verdict was returned in his favor for the possession of the property, and for the sum of \$13.80 damages. Judgment was rendered on the verdict, and the railway company prosecuted error.

It appears that one F. A. Matthis delivered a peddler's wagon to the Chicago & Great Western Railway Company at Pearl City, Ill., to be shipped to the defendant in error, at Beatrice, Neb.; that it was transported by the initial carrier as far as its line of road extended, and was there delivered to the plaintiff in error, and was carried by it to the place of destination; that when the defendant called for the wagon a dispute arose over the freight charges. The amount claimed by the plaintiff was \$13.80, while the defendant insisted that he should be required to pay the sum of \$6.62 only. Efforts were made to adjust the matter in dispute, which were unsuccessful, and thereupon the defendant replevied the wagon, alleging that he had tendered the plaintiff an amount sufficient to pay the proper freight charges. The record discloses that he introduced some evidence tending to show that he had made an inquiry of some one in charge of the plaintiff's office in Beatrice to ascertain the probable cost of transporting the wagon from Pearl City, Ill., to that place, and had been told that it would be about \$6.62; that thereupon he wrote to Matthis to ship it to him. It appears that when the

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wagon was delivered to Matthis, at the Great Western Railway Company, it was not crated or prepared for shipment in the manner required by the company's rules, and therefore the charge for its transportation was greater than the rate contended for by the defendant. No rate was fixed by the contract of shipment, and, when the plaintiff's freight inspector saw the wagon and ascertained its condition, he fixed the rate thereon which is provided for by what is called the "Western Classification," and which it appears applied to all roads west of the Mississippi river, the plaintiff included, and directed the agent of the road at Beatrice to collect that rate from the defendant. It also appears from the evidence that if the wagon had been crated according to the regulations set forth in the "Western Classification" of freights, which classification, together with the rates prescribed thereby, appears to have been posted in the depots of all of said roads, the cost of the shipment would have been \$6.62, but for lack of proper crating the rate was \$13.80, the amount claimed by the plaintiff. There is no conflict of evidence on these questions. The plaintiff claimed the right to hold the property until its lien for the freight charges was paid, while the defendant demanded its delivery on the payment of the lesser rate. This was the real question in dispute, and on the trial the court submitted the question of the reasonableness of the regulations, classification, and freight charges to the jury, by the following instructions: "(2) You are instructed that every common carrier in this state is entitled to a lien upon the property transported by it for the proper and reasonable freight charges thereupon, and that, unless you believe from the evidence that the plaintiff has tendered to the defendant the reasonable and proper freight charges for the shipment of said goods, the defendant will be entitled to a verdict at your hands. If, on the other hand, you find that the amount which was tendered to the defendant is the reasonable, proper, and usual freight charges, under the rules and regulations which have been introduced in evidence before you, adopted by various railway companies adopting such classifications, and that such regulations are fair and reasonable, then you should find for the plaintiff. (3) You are instructed that it is competent for companies engaged in the business of common carriers to adopt rules of classification and tariffs of freight charges for the carriage of goods, and that, if said classifications and tariffs are fair and reasonable, they are lawful and proper, and must be recognized by persons transacting business with such common carriers. And in this case if you believe from the evidence that such regulations are fair and reasonable, and that the goods in controversy were, by the terms and conditions of the 'Western Classification,' which has been introduced in evidence, entitled to be shipped at one and one-half times the first-class rate, at actual weights, then you should find for the plaintiff. But if, on the other

hand, you find that the goods in controversy were, under the rules of the 'Western Classification,' entitled to be rated as first-class, minimum weight fifteen hundred pounds, then you should find for the defendant." That a common carrier has a lien for its proper freight charges on the property transported over its lines of road, and may hold possession of such property until its lien is paid, is the settled law of this state. It is equally well settled that, on tendering the amount of freight charges actually due the carrier, the owner may replevy his goods, and it is unnecessary to again refer to these questions.

The plaintiff's first contention is that the court erred in giving the instructions above quoted. A common carrier may make reasonable rules as to the reception, carriage, and delivery of freights. Such rules and regulations shippers are to conform to. Their reasonableness is a question of law for the court to decide. *Rorer on Railroads*, 227; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Vedder v. Fellows*, 20 N. Y. 126; *Tracy v. N. Y. & Harlem R. Co.*, 9 Bosw. 396. In *Illinois Cent. R. Co. v. Whittemore*, supra, the court said: "The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day, and another to-morrow. In one trial a railway company would be held liable, and in another, presenting the same question, not liable. Neither the companies nor the passengers would know their rights or their obligations. A fixed system for the control of the vast interest connected with the railways would be impossible, while such a system is essential equally to the roads and to the public." In the case at bar there was no conflict of evidence on the question as to what the regulations were which had been fixed by the "Western Classification" as to the manner of preparing the wagon in question for shipment. Neither was there any dispute as to the rate fixed for its transportation when prepared for shipment according to said rules and regulations. Therefore it was the duty of the court to determine, as a matter of law, whether the regulations contained in the classification, which was introduced in evidence, were reasonable or not, and whether the sum charged for transportation thereunder was the proper amount. If these questions are left to the determination of juries, freight rates will soon reach a condition of chaos. What one jury might think was reasonable and just, another jury might reject. And so it would soon be impossible for common car-

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riers to conduct their business with any degree of fairness or uniformity towards their patrons. Again, it is well known and understood that railroad companies act only through their agents; that it is necessary for them to adopt rules and regulations for the guidance of such agents; and it is generally understood that persons dealing with such corporations are to be governed by these rules and regulations, if fair and reasonable. It therefore becomes necessary for the courts, as a matter of law, to determine the question of the reasonableness thereof in case of a disagreement between the railroads and their patrons, because such rules are a part of the contract. For these reasons, we hold that the court erred in giving the instructions complained of.

We deem it unnecessary to consider any of the other assignments of error. For the giving of the instructions above quoted, we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

ALBERT and GLANVILLE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for a new trial.

PETERSON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, Sept. 29, 1903.)

[96 N. W. Rep. 532.]

Carriers—Injuries to Express Messengers—Contracts—Exemption from Liability—Public Policy.

A contract by an express messenger, relieving a railroad company from liability for personal injuries to him while riding on its train in the performance of his duties, caused by the ordinary negligence of the railroad's employees, is valid, and not contrary to public policy.

Same—Same—Contract Exempting from Liability—Enforcement by Railroad Company.

Where an express messenger contracted with the express company as a part of his contract of employment to exempt the express company and the transportation companies with which it dealt from all liability for personal injuries to him arising from negligence or otherwise, and agreed that the stipulation should inure to the benefit of all such transportation companies as fully as if made directly with them, the contract was enforceable by a railroad company by the negligence of which the messenger was injured while performing his duties, as a contract made for the benefit of a third person, whether the railroad company knew of or assented thereto before the commencement of the action or not.

Appeal from Circuit Court, Brown County; Samuel D. Hastings, Judge.

Action by Myron L. Peterson against the Chicago & Northwestern Railway Company. From an order overruling a demurrer to defendant's answer, plaintiff appeals. Affirmed.

This is an action to recover for personal injuries. The

complaint alleges that the plaintiff was an express messenger in the employ of the American Express Company, and that in the course of his employment, and on the 27th day of March, 1901, he was riding in the express car of the defendant's passenger train running from Milwaukee to Green Bay, and that said train, by the negligence of defendant, ran into a freight train, by reason of which collision the plaintiff suffered severe personal injuries. The answer alleged, in substance, that at the time of said collision there was existing and in force between the defendant and the American Express Company a written contract providing for the transportation of express matter and the necessary employees of the express company over the defendant's lines, which contract contained the following provision, among others: "Seventh. As one of the express conditions of this contract the express company hereby binds and obligates itself to save harmless and fully indemnify the railway company and its officers and employees from and against all actions and liabilities for loss or damage resulting in any manner whatever to the property of, or freight and express matter in charge of the express company, or to any of its employees, agents, messengers or officers while traveling as aforesaid upon any line covered by this agreement, it being distinctly understood and agreed that all damages resulting to express matter or to the property of the express company or to persons engaged in the service of the express company while engaged in such service, shall be borne by the express company." That at the same time there was a contract in force between the plaintiff and the American Express Company which contained the following provisions: "Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risks of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employee of any such corporation or person or otherwise, and whether resulting in my death or otherwise. And I hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or on the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or of any employee of any person or corporation, or otherwise. And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claims, or in defending the same, including all

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counsel fees and expenses of litigation connected therewith. I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating such railroad, stage or steamboat line upon which I shall be injured, a good and sufficient release under my hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom. And I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which said express company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto. And I do hereby authorize and empower said express company at any time while I shall remain in its service, to contract for me and on my behalf in its own name or in mine with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as messenger or employee free of charge upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons or of any employee of such corporations or persons or otherwise, and the contract so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steamboat line the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons." The plaintiff demurred generally to the answer, which demurrer was overruled, and the plaintiff appeals.

Sheridan & Evans, for appellant.

Miller, Noyes & Miller (Greene, Fairchild, North & Parker, of counsel), for respondent.

WINSLOW, J. (after stating the facts). The general question presented in this case is whether a railway company can be relieved by contract from liability to an express messenger for personal injuries suffered by him while riding on its train in performance of his duty, such injuries being proximately caused by the ordinary negligence of the employees of the company. The question is new in this state. This court has held that a common carrier may by contract exempt itself from liability to a person traveling on a free pass for injuries caused by the ordinary negligence of its employees.

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but not from the consequence of their gross negligence. *Annas v. M. & N. R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. Also that it is against public policy to allow a common carrier to stipulate for exemption from liability for negligence of its employees resulting in loss or injury to a passenger for hire. *Abrams v. M. L. S. & W. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55. Neither of these cases, however, touch the exact question before us, nor does the early case of *Chamberlain v. M. & M. R. R. Co.*, 7 Wis. 425, Id., 11 Wis. 248, throw any light upon it. The question is an interesting one, and might be discussed at great length.

It seems doubtful, however, whether any good result would be reached by such a discussion. The exact question here presented has been discussed with great learning and ability by the Supreme Court of the United States in the case of *Baltimore, etc., Railway Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and the result there reached was that an express messenger, under the facts here presented, was not a passenger for hire, and that for that reason the contracts exempting the railroad company from liability were not against public policy, but valid. We entirely agree with that result. It commends itself to our judgment, not only upon reason, but upon the great weight of authority. The express messenger is not a person who has applied to a common carrier for transportation, and is entitled to that transportation without condition, upon payment of his fare, but a person who voluntarily goes upon a train, not for transportation, but to transact certain business for the express company which it is allowed to transact, not because the railroad company is a common carrier, but because of a contract between the express company and the railroad company by which the express company and its messengers were granted rights which the railroad company could not be compelled to grant as a common carrier. We could add nothing to the discussion in the *Voigt Case*, and hence we content ourselves with announcing our concurrence with the doctrines there laid down.

It is said that there is a distinction between this case and the *Voigt Case* in that by the contract between the railway company and the express company in the *Voigt Case* the express company agrees to indemnify the railway company from all liability, whether resulting from negligence or otherwise, whereas in the case at bar the agreement is simply to indemnify against damage resulting in any manner whatever. It is said that such contracts are strictly construed against the railway company, and that there must be an express stipulation exempting the company from the results of negligence in order to effect that result, and *Black v. Goodrich T. Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 731, is relied upon. It is not necessary in the present case either to affirm or deny that the agreement between the express company and the railway

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company covered injuries resulting from negligence, because in this case the plaintiff himself, when he entered on his employment, agreed to exempt the express company and the transportation companies with which it dealt from all liability for personal injuries whether arising from negligence or otherwise, and also agreed that this stipulation should inure to the benefit of all such transportation companies as fully as if made directly with them. This was a promise, upon sufficient consideration, made to one person for the benefit of a third person, which could be enforced by such third person whether such third person knew of or assented to the promise before the commencement of the action or not. *Tweeddale v. Tweeddale* (Wis.) 93 N. W. 440, and cases cited. Order affirmed.

BEEDE v. WISCONSIN CENT. RY. CO.

(*Supreme Court of Minnesota, June 19, 1903.*)

[95 N. W. Rep. 454.]

Connecting Carriers—Injury to Freight—Burden of Proof.*

Where goods have been transported by several connecting carriers, and they are shown to have been in good condition when delivered to the first carrier, but damaged when delivered by the last carrier, the burden is on it to show that the loss did not result from any cause for which it was responsible. The rule is not modified when the goods are transported in through sealed cars.

Same—Same—Sufficiency of Evidence.

The verdict herein, to the effect that certain apples were injured by frost while in the custody of the defendant, by its negligence, is sustained by the evidence.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; H. D. Dickinson, Judge.

Action by John W. Beede, doing business as John W. Beede & Co., against the Wisconsin Central Railroad Com-

*As to the burden of proving which carrier was guilty of the negligence causing loss of or injury to freight transported over several connecting lines, see *Willet v. Southern Ry.* (S. Car.), 8 R. R. R. 141, 31 Am. & Eng. R. Cas., N. S., 141 (presumption); *Cote v. New York, N. H. & H. R. Co.* (Mass.), 5 R. R. R. 270, 28 Am. & Eng. R. Cas., N. S., 270 (presumption that injury occurred on last line); notes, 5 Am. & Eng. R. Cas., N. S., 59 (presumption); 14 Am. & Eng. R. Cas., N. S., 212 (presumption that injury occurred on last line); *Louisville & N. R. Co. v. Tennessee Brewing Co.* (Tenn.), 4 Am. & Eng. R. Cas., N. S., 661; *Gulf, etc., Ry. Co. v. Jones* (Ind. Ter.), 5 Am. & Eng. R. Cas., N. S., 695; *Cincinnati, N. O. & T. P. Ry. Co. v. N. K. Fairbanks & Co.* (C. A.), 13 Am. & Eng. R. Cas., N. S., 179 (presumption as to initial carrier's liability); *Farmington Mercantile Co. v. Chicago, B. & Q. R. Co.* (Mass.), 5 Am. & Eng. R. Cas., N. S., 59 (presumption as to negligence of initial carrier); *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 429 (presumption as to which connecting carrier caused loss); *Moore v. New York, N. H. & H. R. Co.* (Mass.), 14 Am. & Eng. R. Cas., N. S., 210 (presumption that injury occurred on last line).

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pany. Verdict for plaintiff. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Edmund A. Prendergast and Thomas H. Gill, for appellant.

Geo. C. Stiles, for respondent.

START, C. J. Action to recover damages which the plaintiff sustained by the alleged negligence of the defendant, as a common carrier, in the transportation of two car loads of apples. At the close of the evidence the defendant requested the trial court to direct a verdict in its favor. The motion was denied, and the cause submitted to the jury, and a verdict returned in favor of the plaintiff. The defendant appealed from an order denying its motion for judgment or a new trial.

The principal question on this appeal is whether the verdict is sustained by the evidence. The facts were stipulated by the parties, except certain facts to which an expert testified. The facts, as stipulated, were, in effect, these: The plaintiff shipped from Plymouth, N. H., two car loads of apples, consigned to himself at St. Paul. The apples were in good condition when delivered to the initial carrier, and were placed in refrigerator cars, and forwarded at owner's risk of freezing, and arrived at their destination with the seal to the cars intact. When the apples were delivered to the plaintiff at St. Paul by the defendant, the last carrier, they had been injured by frost, and the plaintiff was damaged thereby in the sum of \$236.25, for which sum, with interest, it was stipulated he should have judgment in this case, if entitled to recover. The cars reached Lancaster, N. H., December 9, 1900, and remained there some 19 hours. During this time the thermometer ranged from 6 to 16 degrees below zero. It does not appear whether anything was done to protect the apples from frost while the cars were at Lancaster. The cars came into the possession of the defendant at Manitowoc on December 15th, and were forwarded over its line on the first train leaving after their arrival. In the meantime they stood upon the side track of the defendant 17 hours without any protection from the elements, during which time the thermometer ranged from 8 to 17 degrees below freezing point. There was also testimony by an expert in handling and transporting fruit to the effect that apples, if kept in motion, could be transported in refrigerator cars without freezing when the thermometer ranged from zero to 15 degrees below. He also expressed an opinion to the effect that, if the apples were side-tracked and remained without any protection for 17 hours, they would become frosted, with the thermometer standing from 8 to 17 degrees below freezing point. It is the claim of the defendant that it conclusively appears from the evidence that the apples were frozen before they came to the possession of the defendant. It may be conceded that the evidence

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would sustain a verdict to that effect, but we are of the opinion that the verdict against the defendant is not so decidedly against the preponderance of the evidence as to justify us in interfering with it. The apples were in good condition when accepted by the first carrier, and damaged by frost when delivered to the consignee by the defendant, the last carrier; hence the burden was on it to show that the loss did not result from any cause for which it was responsible. *Shriver v. Railway Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Shea v. Railway Co.*, 63 Minn. 229, 65 N. W. 458. This rule is not modified, as defendant claims, by the fact that the apples were transported in through sealed cars. *Leo v. Railway Co.*, 30 Minn. 438, 15 N. W. 872.

The defendant sought to show that it was not responsible for the loss by showing that the weather was colder while the apples were in the hands of the initial and intermediate carriers than it was while the defendant had control of them, and that for 19 hours the cars were detained at Lancaster when the weather was severely cold. It cannot, however, be presumed, in the absence of evidence, that no measures were taken to protect the apples from frost during this delay. The evidence was not conclusive that the apples were in the same condition when they came to the hands of the defendant as they were when it delivered them to the plaintiff, for the inference to be drawn from the admitted facts was one of fact for the jury. There were no prejudicial errors in the charge of the court. It is clear from the whole charge that the court did not intend to submit to the jury any claim on the part of the plaintiff for damages by reason of the delay of the cars at Manitowoc. What was said in this respect was technically inaccurate, but could not, in our opinion, have misled the jury. If defendant believed otherwise, it should have called the attention of the court to the matter. *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754.

Order affirmed.

CENTRAL OF GEORGIA RY. CO. v. GLASCOCK & WARFIELD.

(*Supreme Court of Georgia, April 8, 1903.*)

[43 S. E. Rep. 981.]

Carriers of Live Stock—Limiting Liability—Reduced Rate—Degree of Care—Instruction.*

In a suit for damages against a railroad for injury to live stock shipped over the defendant's line, where it appears that, by a special contract signed by the plaintiffs as well as the agent of the railroad company, the consideration of which was the grant of a reduced freight rate on

*As to the degree of care required of a carrier of live stock, see *Louisville & N. R. Co. v. Harned* (Ky.), 1 R. R. R. 115, 24 Am. & Eng. R. Cas., N. S., 115 (not insurers); *Texas & P. Ry. Co. v. Tribble* (Tex.), 3 R. R. R. 32, 26 Am. & Eng. R. Cas., N. S., 32; *Heller v. Chicago & G. T. R. Co.* (Mich.), 3 Am. & Eng. R. Cas., N. S., 599.

†As to whether a carrier of live stock may limit its liability, see Chi-

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the shipment, the plaintiffs agreed that the defendant should be liable only as a private carrier for hire, it was error for the court to charge that the railroad company was bound to the exercise of extraordinary diligence.

Same—Same—Damages—Agreement as to Value.†

Where, by the contract referred to, it was agreed that, in the event of damage to the stock for which the railroad company might be liable, the amount claimed should be limited to a certain amount for each of the animals shipped, it was error for the court to charge the jury, without qualification, that, if they found the defendant liable, the measure of damages for the horses killed would be the market value of the horses.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by Glascock & Warfield against the Central of Georgia Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed.

R. D. Feagin, Hall & Wimberly, and J. E. Hall, for plaintiff in error.

R. L. Ryals and T. S. Felder, for defendants in error.

CANDLER, J. This was a suit for damages on account of

cago & N. W. R. Co. *v.* Calumet Stock Farm (Ill.), 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162 (absence of assent to bill of lading); Normile *v.* Oregon R. & Nav. Co. (Ore.), 5 R. R. R. 306, 28 Am. & Eng. R. Cas., N. S., 306 (not as to negligence); notes, 7 Am. & Eng. R. Cas., N. S., 573; 10 Am. & Eng. R. Cas., N. S., 337; 13 Am. & Eng. R. Cas., N. S., 170; 7 Am. & Eng. R. Cas., N. S., 524 (as to cars furnished); 7 Am. & Eng. R. Cas., N. S., 609 (to own line); 8 Am. & Eng. R. Cas., N. S., 430 (limiting time for bringing suit); 21 Am. & Eng. R. Cas., N. S., 436 (by imposing duty of loading upon shipper); 8 Am. & Eng. R. Cas., N. S., 420 (drovers pass as consideration); Cincinnati, N. O. & T. Ry. Co.'s Receiver *v.* Graves (Ky.), 16 Am. & Eng. R. Cas., N. S., 177; Cooper *v.* Raleigh & G. R. Co. (Ga.), 18 Am. & Eng. R. Cas., N. S., 412; Norfolk & W. Ry. Co. *v.* Reeves (Va.), 16 Am. & Eng. R. Cas., N. S., 166; Crawford *v.* Southern Ry. Co. (S. Car.), 19 Am. & Eng. R. Cas., N. S., 17 (requiring shipper to load at his own risk); Loeser *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 8 Am. & Eng. R. Cas., N. S., 421 (injuries from acts of the animals, construction of contract); Chesapeake & O. R. Co. *v.* American Exch. Bank (Va.), 3 Am. & Eng. R. Cas., N. S., 424 (loading and unloading); Maxwell *v.* Southern Pac. R. Co. (La.), 3 Am. & Eng. R. Cas., N. S., 425 (negligence); Grieve *v.* Illinois Cent. R. Co. (Iowa), 9 Am. & Eng. R. Cas., N. S., 669; Louisville & N. R. Co. *v.* Bell (Ky.), 8 Am. & Eng. R. Cas., N. S., 413 (free pass as consideration); St. Louis, I. M. & S. Ry. Co. *v.* Law (Ark.), 18 Am. & Eng. R. Cas., N. S., 286 (requiring notice of claim); Gulf, Colorado, etc., R. Co. *v.* Stanley (Tenn.), 2 Am. & Eng. R. Cas., N. S., 480 (reasonableness of stipulation requiring action to be brought within forty days); Houston & Texas Central R. Co. *v.* Davis (Tex.), 2 Am. & Eng. R. Cas., N. S., 487 (negligence); Leonard *v.* Whitcomb (Wis.), 7 Am. & Eng. R. Cas., N. S., 520 (as to cars furnished); Texas & P. Ry. Co. *v.* Reeves (Tex.), 8 Am. & Eng. R. Cas., N. S., 429 (time for bringing action); Keller *v.* Baltimore & O. R. Co. (Pa.), 19 Am. & Eng. R. Cas., N. S., 197 (to own line); Meuer *v.* Chicago, Milwaukee, etc., R. Co. (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 493 (shipper accompanying stock); Pittsburgh, C., C. & St. L. Ry. Co. *v.* Sheppard (Ohio), 6 Am. & Eng. R. Cas., N. S., 528; Stewart *v.* Cleveland, C., C. & St. L. Ry. Co. (Ind.), 13 Am. & Eng. R. Cas., N. S., 28 (validity where same rate has been granted other shippers without limitation of liability).

Limiting liability by agreement as to value of stock, see foot-note

Central of Georgia Ry. Co. v. Glascock & Warfield

injuries to certain live stock, alleged to have been sustained while the stock were being shipped over the defendant's line of railroad from Atlanta to Macon. The jury returned a verdict in favor of the plaintiffs. The defendant made a motion for a new trial, which was overruled, and it excepted. It appears that the shipment was made from a point in Kentucky, and was in pursuance of a written contract of carriage signed by the plaintiffs and by the agent of the initial carrier. This contract recited as its consideration the grant to the shippers of a reduced rate of freight, and provided, among other things, that the liability of the railroad company should be "only that of a private carrier for hire," and should cease at the station to which the shipment was destined; that, in case of damage for which the carrier should be liable, the amount to be claimed should be limited to specified sums, varying according to the different kinds of animals enumerated; and that, "as a condition precedent to the shipper's right to recover any damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company, or other carrier, from whom he receives said animals, before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals." The contract also provided that, in the absence of an agreement to the contrary, its stipulations should constitute a contract between the plaintiffs and every other carrier over whose line the shipment should pass to its destination.

1. The following portion of the charge of the court is assigned as error: "If the plaintiffs' stock were damaged while in defendant's possession, by being transported and delivered, as alleged, and it does not appear that they exercised extraordinary diligence in the care and transporting of that property, that the plaintiffs would be entitled to have a verdict at your hands." In view of the special contract of affreightment between the parties, which was signed by the plaintiffs as well as the agent of the railroad company, the charge excepted to was erroneous. It is well settled that "carriers of live stock may limit their liability by a special contract, which will be enforced, if based upon a sufficient consideration, and if

appended to *Louisville & N. R. Co. v. Frazee* (Ky.), 6 R. R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22 (shipper not bound by clause of accepted bill of lading fixing value of horses); *Normile v. Oregon R. & Nav. Co.* (Ore.), 5 R. R. R. 306, 28 Am. & Eng. R. Cas., N. S., 306; *Southern Ry. Co. v. Jones* (Ala.), 1 R. R. R. 725, 24 Am. & Eng. R. Cas., N. S., 725 (not against public policy); notes, 7 Am. & Eng. R. Cas., N. S., 573; 10 Am. & Eng. R. Cas., N. S., 337; 13 Am. & Eng. R. Cas., N. S., 170; *Loeser v. Chicago, M. & St. P. Ry. Co.* (Wis.), 8 Am. & Eng. R. Cas., N. S., 421; *Williams v. Houston & Texas Central R. Co.* (Tex.), 2 Am. & Eng. R. Cas., N. S., 533; *Illinois Cent. R. Co. v. Radford* (Ky.), 23 Am. & Eng. R. Cas., N. S., 124; *Houston & Texas Central R. Co. v. Davis* (Tex.), 2 Am. & Eng. R. Cas., N. S., 487.

not unreasonable, immoral, or contrary to public policy." *Cooper v. Raleigh R. Co.*, 110 Ga. 662, 36 S. E. 241, and cases cited. The consideration of the contract in the present case, viz., the grant of a greatly reduced rate of freight, was valid, reasonable, and sufficient to support its stipulations. By the terms of that contract, the liability of the railroad company was limited to that of a private carrier for hire, the measure of whose duty is ordinary diligence. See *Hutchinson, Car.* (2d Ed.) 37. It follows that the charge of the court to which we have referred placed on the defendant company a burden greater than that imposed by its contract, and was error clearly prejudicial to its rights.

2. The motion for a new trial also complains that the court below erred in the following charge: "If the plaintiffs are entitled to recover for the horse alleged to have died, they would be entitled to recover the value of that horse—the market value of him. If they are entitled to recover for the horse alleged to have died two or three days after reaching Macon, then they would be entitled to recover the market value of that horse." The fault to be found with this charge, as with the one with which we have previously dealt, is that it entirely disregards the effect upon the plaintiffs' right to recover of their special contract of affreightment with the defendant. In another portion of his charge the court very properly left it to the jury to determine whether that paragraph of the contract which limited the amount to be claimed in case of damage due to the negligence of the defendant was an agreement between the parties as to the value of the stock or an arbitrary estimate of damages; instructing them that in the latter event the plaintiffs would not be bound by that stipulation, while in the former they would. See *Southern Ry. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649 (2), and cases cited. The jury, then, were authorized to find that the plaintiffs were limited in their recovery to the amounts specified in the contract; and to give the additional charge that, in the event they found the defendant liable, they would be compelled to measure the damage for the horses killed by the market value of the animals, set up a possibly erroneous measure of damages, and necessarily tended to confuse the jury as to the amount they were entitled to find for the plaintiffs.

The motion for a new trial contains numerous other grounds, some of which are without merit, and some of which show error on the part of the trial court, but not of sufficient materiality to require a reversal of the judgment overruling the motion. The errors pointed out in the foregoing, however, manifestly require that the case should be tried again, in accordance with the principles herein laid down.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

MORSE v. CANADIAN PAC. RY. CO.*(Supreme Judicial Court of Maine, Dec. 9, 1902.)*

[53 Atl. Rep. 874.]

Carriers of Freight—Limiting Liability.*

In this state a common carrier may, by agreement, limit his common-law liability for loss or damage of goods, though not his liability for the consequences of his own negligence.

Same—Same.

An agreement in a contract of carriage that the carrier shall not be responsible for loss or damage resulting from one of certain specified causes (other than his own negligence) is valid.

Same—Negligence—Burden of Proof.

When the evidence prima facie indicates that the loss or damage of goods during carriage resulted from any of the excepted causes, the

*As to whether a common carrier can limit its liability, see foot-note appended to preceding case (live stock); *Louisville & N. R. Co. v. Landers* (Ala.), 7 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96 (to own line); *Adams Exp. Co. v. Carnahan* (Ind.), 3 R. R. R. 677, 26 Am. & Eng. R. Cas., N. S., 677 (contract not measured by different rules than where carriers are not parties); *Hughes v. Pennsylvania R. Co.* (Pa.), 2 R. R. R. 925, 25 Am. & Eng. R. Cas., N. S., 925; *San Antonio & A. P. Ry. Co. v. Barnett* (Tex.), 1 R. R. R. 789, 24 Am. & Eng. R. Cas., N. S., 789 (failure to read contract); *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. R. Cas., N. S., 668 (reduced rate as consideration); *Texas & Pacific Ry. Co. v. Callender* (U. S.), 1 R. R. R. 186, 24 Am. & Eng. R. Cas., N. S., 186 (specified and general clauses in bill of lading); *Cau v. Texas & P. Ry. Co.* (C. C. A.), 1 R. R. R. 774, 24 Am. & Eng. R. Cas., N. S., 774 (bill of lading accepted without objection); *Chicago, R. I. & P. Ry. Co. v. Western Hay & Grain Co.* (Neb.), 2 R. R. R. 953, 25 Am. & Eng. R. Cas., N. S., 953 (to own line); *Charnock v. Texas & P. Ry. Co.* (C. C. A.), 1 R. R. R. 776, 24 Am. & Eng. R. Cas., N. S., 776 (bill of lading accepted without objection); *Hartley v. St. Louis, K. & N. W. R. Co.* (Iowa), 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569 (to own line); *Pittsburgh, C., C. & St. L. Ry. Co. v. Viers* (Ky.), 3 R. R. R. 62, 26 Am. & Eng. R. Cas., N. S., 62 (to own line); *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.* (Neb.), 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470 (to own line); notes, 7 Am. & Eng. R. Cas., N. S., 524 (as to cars furnished); 7 Am. & Eng. R. Cas., N. S., 609 (to own line); 8 Am. & Eng. R. Cas., N. S., 430 (limiting time for bringing suit); 7 Am. & Eng. R. Cas., N. S., 713 (connecting carriers); 10 Am. & Eng. R. Cas., N. S., 863 (time for bringing claim); 10 Am. & Eng. R. Cas., N. S., 352 (delivery at flag station); 2 Am. & Eng. R. Cas., N. S., 678 (how far liability may be limited); 20 Am. & Eng. R. Cas., N. S., 459 (duration of liability); 20 Am. & Eng. R. Cas., N. S., 681 (monograph); 8 Am. & Eng. R. Cas., N. S., 430 (time for bringing suit); 7 Am. & Eng. R. Cas., N. S., 573; 10 Am. & Eng. R. Cas., N. S., 337 (to fixed amount in consideration of reduced rates); 13 Am. & Eng. R. Cas., N. S., 170 (when consideration unnecessary); 13 Am. & Eng. R. Cas., N. S., 187 (to own line); *Burgher v. Chicago, R. I. & P. R. Co.* (Iowa), 11 Am. & Eng. R. Cas., N. S., 130; *Cox v. Vermont Cent. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 591; *Grieve v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 669; *St. Louis & S. F. Ry. Co. v. Sherlock* (Kan.), 9 Am. & Eng. R. Cas., N. S., 462; *Pierce v. Southern Pac. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 564 (negligence, against public policy); *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782 (assent of shipper to clause of bill of lading limiting liability); *Pierce v. Southern Pac. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 564 (fixed value); *St. Louis, I. M. & S. Ry. Co. v. Law* (Ark.), 18

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burden of proof is on the shipper to show that the loss or damage actually resulted from the carrier's negligence.

Evidence.

Held, that the evidence prima facie indicates that the death of the plaintiff's horses resulted from causes excepted by agreement in the contract of carriage, and the plaintiff has not shown that the death was caused by any negligence of the carrier.

(Official.)

Report from supreme judicial court, Penobscot county.

Action by Charles W. Morse against the Canadian Pacific Railway Company. Case reported, and plaintiff nonsuit.

Case to recover the value of two horses belonging to the plaintiff, which died while being transported over the defendant's railway between Montreal and Brownville Junction.

It was alleged in the writ and admitted by the defendant that the horses when they left Montreal were apparently in good order and condition, and no question was raised that they died. The plaintiff averred that the injury and death to his horses were caused solely by the gross carelessness of the defendant company.

Argued before WISWELL, C. J, and EMERY, WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

P. H. Gillin and T. B. Towle, for plaintiff.

C. F. Woodard, for defendant.

EMERY, J. The Wabash Railroad Company received

Am. & Eng. R. Cas., N. S., 286 (requiring notice of claim) ; Kellerman v. Kansas City St. J. & C. B. R. Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 290 (value limitation) ; Cox v. Vermont Cent. R. Co. (Mass.), 9 Am. & Eng. R. Cas., N. S., 591 ; Dixie Cigar Co. v. Southern Exp. Co. (N. Car.), 10 Am. & Eng. R. Cas., N. S., 863 ; Texas & P. Ry. Co. v. Reeves (Tex.), 8 Am. & Eng. R. Cas., N. S., 429 (time for making claim) ; Ullman v. Chicago & N. W. Ry. Co. (Wis.), 23 Am. & Eng. R. Cas., N. S., 782 (negligence) ; Merrill v. Pacific Transfer Co. (Cal.), 21 Am. & Eng. R. Cas., N. S., 143 (obligation to read receipt for trunk limiting liability) ; Gardner v. Southern Ry. Co. (N. Car.), 20 Am. & Eng. R. Cas., N. S., 82 (negligence) ; Allan v. Pennsylvania R. Co. (Pa.), 10 Am. & Eng. R. Cas., N. S., 347 (provision that goods delivered on certain platform, where there is no protection from weather, shall be at shipper's risk) ; Mouton v. Louisville & N. R. Co. (Ala.), 20 Am. & Eng. R. Cas., N. S., 673 (reduced rate as consideration) ; Ward v. Missouri Pac. Ry. Co. (Mo.), 19 Am. & Eng. R. Cas., N. S., 30 (reduced valuation as consideration for reduced rate) ; Chicago, Milwaukee, etc., R. Co. v. Wallace (C. C. A.), 2 Am. & Eng. R. Cas., N. S., 651 ; Richardson v. Chicago & A. Ry. Co. (Mo.), 13 Am. & Eng. R. Cas., N. S., 170 (time for bringing action) ; Central of Georgia Ry. Co. v. Murphey (Ga.), 21 Am. & Eng. R. Cas., N. S., 555 (fixing value) ; Gardner v. Southern Ry. Co. (N. Car.), 20 Am. & Eng. R. Cas., N. S., 82 (validity of reduced valuation clause for which no consideration is shown) ; Kansas City, Ft. S. & M. Ry. Co. v. Sharp (Ark.), 7 Am. & Eng. R. Cas., N. S., 710 (whether stipulation inures to benefit of connecting carrier) ; Page v. Chicago, St. Paul, etc., R. Co. (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 622 (to own line) ; Keller v. Baltimore, etc., R. Co. (Pa.), 4 Am. & Eng. R. Cas., N. S., 263 (to own line) ; Missouri, K. & T. Ry. Co. v. Bowles (Ind. Ter.), 8 Am. & Eng. R. Cas., N. S., 12 (to own line) ; Louisville & N. R. Co. v. Farmers', etc., Live Stock Commission Firm (Ky.), 17 Am. & Eng. R. Cas., N. S., 284 (validity of stipulation by initial carrier) ; Louisville & N. R. Co. v. Tarter (Ky.), 7 Am. & Eng. R. Cas., N. S., 607.

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from the plaintiff's agent at Chicago 20 horses for transportation over its own and connecting railroads to Bangor. In the course of that transportation these horses were received alive and apparently in good condition at Montreal by the Canadian Pacific Railway Company, the defendant, but when the car containing them was delivered by the defendant company to the Bangor & Aroostook Railroad Company at Brownville Junction two of the horses were found dead in the car. This action is to recover the value of these two horses, and the plaintiff, in his declaration, has counted upon the common-law liability of the defendant company as a common carrier.

The defendant, however, pleaded and put in evidence a special written contract made between the plaintiff and the Wabash Railroad Company, for itself and connecting railroads, to govern the transportation of the 20 horses. In this written contract, among other stipulations, were these: (1) That the plaintiff should load and unload the horses, and take care of them while being transported, at his own risk and expense; (2) that he should feed, water, and take care of his horses at his own expense and risk, and to assume all risk of injury and damage that the horses might do to themselves or each other, or which might arise from delay of trains; (3) that he would not hold the Wabash Company or any connecting railroad company responsible for any loss, damage, or injury which might happen to the horses or be sustained by them while being loaded, forwarded, or unloaded, or from suffocation while in the cars, or from any injury caused by overloading cars, or from fright of animals, or from crowding upon one another. These stipulations were made upon sufficient consideration, and their reasonableness and consequent validity are not questioned; nor is it questioned that the defendant company, operating a connecting railroad, is entitled to the benefit of them.

The first question is whether the evidence shows, *prima facie* at least, that the death of the two horses was the result of some of the acts or omissions or events for which the plaintiff had assumed the responsibility and risk.

We think it does. All the 20 horses had been loaded loose in one car. The plaintiff himself testified that the dead horses were badly trampled about the head and neck. The veterinary testified that the bruises and wounds upon them resulted from being trampled upon by another horse; that they were trampled upon while alive. Another witness testified that the dead horses looked as if they had been pounded and trampled to death. There was no other evidence as to the cause of the death. So far as appears, the death resulted from the plaintiff putting too many horses in one car, or from his leaving them loose in the car, or from some fright of the horses, or from their crowding upon one another; all of which events the plaintiff stipulated should be at his own risk.

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In consequence of the above stipulations and evidence, the plaintiff cannot recover, unless he shows by evidence that the death of the two horses was in fact caused by the negligence or other fault of the defendant company. This he has so far failed to do. He suggests in argument that the horses were probably thrown down by some collision of cars, or the too quick starting or stopping of the car, or by some other concussion. There is no evidence, however, of any such event.

The plaintiff further argues that, in the absence of evidence upon this point, the causative fault of the defendant company should be presumed, for the reason that the defendant company, as common carrier, has the burden of proving affirmatively its freedom from such fault. It is well settled, however, that when the common-law liability of a common carrier is limited by valid exclusionary stipulations, and the loss apparently results from some cause excluded by the stipulations, the burden is then upon the shipper to affirmatively prove that, nevertheless, the loss or damage was in fact caused by the fault of the carrier. For the want of such evidence in this case, the plaintiff must be nonsuited.

Plaintiff nonsuit.

MARSHALL & MICHEL GRAIN CO. v. KANSAS CITY, FT. S. & M. R. CO.

(Supreme Court of Missouri, Division No. 2, June 9, 1903.)

[75 S. W. Rep. 638.]

Connecting Carriers—Through Shipments—Bill of Lading—Limitation of Liability to Own Line—Constitutionality of Statute.*

Rev. St. 1899, § 5222, providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any loss, damage, or injury to the property caused by its negligence, or the negligence of any other carrier to which the property may be delivered, or over whose lines it may pass, etc., when construed as depriving a carrier of the right to contract for a limitation of liability beyond its own line with respect to a through shipment, is not unconstitutional.

Same—Same—Same—Same.†

Where a carrier issued a bill of lading in Missouri for a through shipment beyond its own line to a point in Arkansas, it could not exempt itself from liability for a conversion of the property by a connecting carrier by a provision in the bill limiting its liability to its own line.

Same—Conversion—Delivery to Consignee without Presentation of Bill of Lading or Payment of Draft.

Grain was delivered to a carrier for shipment to a destination beyond its own line under a through bill of lading. A sight draft, with the bill of lading attached, was forwarded through certain banks for collection from the consignee, who refused to accept the same because of the nonarrival of the grain. The draft was protested and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond, without presentation of the bill of lading, and without payment of the draft: *held*, that such delivery constituted a conversion of the grain by the connecting carrier.

*See *Miller Grain & Elevator Co. v. Union Pac. Ry. Co. (Mo.)*, 8 Am. & Eng. R. Cas., N. S., 1.

†See generally, preceding case and foot-note.

Marshall & Michel Grain Co. v. Kansas City, etc., R. Co**Immaterial Evidence.**

Evidence that after the conversion plaintiff was notified from time to time and knew that the grain was in a certain place, at his final disposal, was immaterial.

Same—Custom.

Where grain shipped had been converted by a carrier in delivering the same to the consignee without presentation of the bill of lading, and was thereafter redelivered to the carrier, and by it stored in a warehouse, evidence, in an action for the conversion, that it was customary for the carrier to store grain in a warehouse while awaiting demand or the bill of lading, was immaterial.

Appeal from Circuit Court, Jasper County.

Action by the Marshall & Michel Grain Company against the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Parker and Pratt, Dana & Black, for appellant.

Thomas Dolan, for respondent.

BURGESS, J. On August 5, 1895, Marshall & Antles, of whom plaintiffs are successors, delivered to the defendant a car of corn for shipment over its railroad from Joplin to Little Rock, Ark., with instruction on the bill of lading to notify the Little Rock Grain Company. Little Rock was not on the line of defendant's road, but the agent of defendant at Joplin, having authority to so do, contracted with the shippers to transport said car of corn to Little Rock, and received therefor the entire freight charge and rate between Joplin and Little Rock, and delivered to the shippers a bill of lading for said car of corn. The bill of lading showed the receipt by defendant from Marshall & Antles of one car of corn, said to weigh 33,375 pounds, "to be transported over the line of this [defendant's] railway to ———, and delivered after payment of freight and advance charges in like good order to the consignee, or a connecting carrier if the same are to be forwarded beyond the line of this company's road, to be carried to the place of destination; it being expressly agreed that the responsibility of this company shall not extend beyonds its own line." The bill of lading also showed that the corn was consigned "S. O. notify Little Rock Grain Company, Little Rock, Arkansas." The distance from Joplin, Mo., to Little Rock, Ark., by the route which the car was to travel (that is, over defendant's road to Jonesboro, and from there over the St. Louis Southwestern Railroad, commonly spoken of as the Cotton Belt Road), was about 400 miles. A reasonable time for the transit would be from four to six days, and the car reached Little Rock, August 10, 1895. The shippers had sold the corn to the Little Rock Grain Company for \$268.20, and, upon receiving said bill of lading from appellant's agent, drew a draft through their bank at Joplin upon the Little Rock Grain Company for that amount. The draft was deposited in said bank at Joplin, with the bill

of lading attached, and went through regular collection channels by way of Kansas City to Little Rock, where, on August 9, 1895, it was presented by the clerk of the German National Bank in that city to the Little Rock Grain Company for acceptance. The drawee refused to accept the draft because the corn had not arrived. The clerk thereupon protested the draft for nonacceptance for that reason, and notified plaintiffs. The draft was returned to plaintiffs through their bank at Joplin, and the protest fees, amounting to \$3.46, were charged to them. Plaintiffs had defendant's agent trace the corn, and on August 13th said agent (Conley) received from the Cotton Belt agent at Little Rock a telegram, which was at once shown to plaintiffs, reading: "Car F. S. & M. 2194 arrived 10th; delivered Little Rock Grain Co., Aug. 12th." The same day (August 13th) plaintiffs drew another draft on the grain company for the amount of the first one plus the protest fees, and deposited it in the same Joplin bank, with the same bill of lading attached. This draft on August 17, 1895, was presented by the same bank clerk at Little Rock to the grain company there for acceptance. Thereupon the grain company telegraphed plaintiffs: "Your draft with protest fees added is here. Is subject to protest. Will pay only invoice face. This ultimatum." The plaintiffs having made no reply, the grain company refused to accept the draft because "the amount was not correct," and the bank clerk protested it, and notified the plaintiffs thereof. The second draft, with original bill of lading attached, was returned through the same channels to the shippers, who kept the bill. They made no effort to secure the corn; gave no directions for its disposition; nor was the bill of lading ever presented to appellant or its connecting line, the Cotton Belt Railway Company; nor was any demand ever made by the shippers, or anybody for them, upon either of said railroad companies for the corn. Nor did they ever give the purchaser any chance to pay the price agreed on and get the corn. Instead, they held onto their shipper's order bill of lading, and refused to give any directions for the disposal of the corn, though frequently asked to do so. After the arrival of the corn at Little Rock, the car was placed upon the warehouse track of the grain company, where it was unloaded by that company (its identity being preserved) as a warehouseman, under a general bond given by the Cotton Belt Railway Company. A few days afterwards, the bill of lading not having been presented by the grain company, the Cotton Belt Company's agent at Little Rock demanded the surrender of the bill or of the corn. The bill of lading not being produced, for the reasons already stated, the corn was at once reloaded into a car furnished by the Cotton Belt Company; being the identical corn which plaintiffs had shipped, and in exactly the same condition as when it reached Little Rock; there being no claim or pretense that it had sustained

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any damage whatever. On August 22, 1895, the shippers were asked by the Cotton Belt Company for directions as to the disposition of the corn, whereupon they replied: "Yours 1st. Have just notified Memphis Road we would not accept car since it has been delivered once. Our draft now amounts to \$275.12, and will take matter up with G. F. A. Memphis Road and get protection, and you to protect yourself had better wire authority to make draft at once. As to terms, etc., it is quite evident that we know as much, or more, about terms than you do about S. O. shipments, and advise you to act promptly in this matter before it is out of our reach." Repeated demands were made by the Cotton Belt Company, in correspondence with the shippers to induce them to receive the corn or direct its disposition, which they refused to do; and it was finally stored with a warehouseman at Little Rock, and the shippers were advised of that fact, and that it would still be delivered to them on presentation of the original bill of lading. The grain was subsequently, about a year after its shipment, and long after this action was begun, sold by the shippers to the highest bidder at Little Rock; the net proceeds of the sale, after deducting warehouse charges, amounting to \$128.50. These charges were for storage at the rate of one-quarter of 1 cent per bushel per month, and were only for the charges of the second warehouseman. February 22, 1896, this action was begun before a justice of the peace to recover the value of the corn at the selling price above stated, upon the ground that defendant had received the corn for shipment to the shippers at Little Rock, Ark., "and to there deliver it to said Marshall & Antles, or their order, but said defendant company, its officers and agents, instead of so delivering said corn, wrongfully converted the same to their own use." From a judgment for plaintiff, defendant appealed to the circuit court, where a jury was waived, and on trial a judgment rendered by that court in favor of defendant, from which plaintiff appealed to the Kansas City Court of Appeals, which reversed the judgment, remanding the cause, after which it was tried before the circuit court and a jury, and a judgment rendered for plaintiff for \$137.70, from which this appeal has been prosecuted by defendant. The appeal was taken to this court because constitutional and federal questions are claimed to be involved.

At the close of the evidence on the part of plaintiffs, and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence which was refused, and the action of the court in this regard is assigned for error. The argument is that, since the contract of carriage expressed in the bill of lading was, on defendant's part, to carry only over its own line, as the alleged conversion (if there was any) occurred at Little Rock, on the line of a connecting carrier, it was the act of that carrier, hence there was no evidence of any failure on the part of defendant, under

the contract, to discharge its duty to plaintiff, and that section 5222, Rev. St. 1899, when construed and applied to the bill of lading in evidence, as the trial court construed and applied it, is repugnant to article 1, § 8, of the federal Constitution, and denied the defendant the freedom of contracting in such matters. That section of the statute reads as follows: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of such property, from the common carrier, railroad, or transportation company, through whose negligence the loss, damage, or injury may be sustained." In support of this contention, defendant relies upon *Dimmitt v. Railroad*, 103 Mo. 440, 15 S. W. 761, *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, and *Missouri, Kansas & Texas R. R. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093, and says that in all these cases it was plainly intimated that while the statute was not repugnant to the Constitution, as applied to the facts of the case then under consideration, it might be applied in such way as to become so, by a construction which denied to an interstate carrier the right and power to limit its contract of carriage, and consequent liability, in case of an interstate shipment, to its own line. We think those cases were properly interpreted by the Kansas City Court of Appeals in the case of *Bank v. C. G. W. Ry. Co.*, 72 Mo. App. 82, wherein it was said: "A carrier receiving freight destined beyond its own line may stipulate that it will not be liable for negligence of the connecting carrier if its contract of carriage is limited to the end of its own route. But if the receiving carrier's contract is to transport the freight to point of destination, it cannot so limit its liability, and must answer for the negligence of the connecting carrier. Those cases further hold that the receiving carrier, in receiving freight and issuing a bill of lading therefor to a point beyond its own line, prima facie agrees to carry to such point, and, to prevent such construction of the contract, it will be necessary that it stipulate it is only to carry to the end of its own line." That case was followed with approval in this case. 74 Mo. App. 81. Moreover, *McCann's Case* was affirmed by the Supreme Court of the United States in 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093, wherein it was

held that the statute, as interpreted by this court in that case, could not be held to be repugnant to the Constitution of the United States.

It will be observed, from the bill of lading, that the point of destination to which the grain was to be shipped was left blank; hence there was no express agreement with respect thereto. But it was clearly shown by indorsement at the end of the bill of lading that the place to which it was to be, and was in fact, shipped, was Little Rock, Ark. And defendant, having received and issued a bill of lading for the corn to a point beyond its own line, *prima facie* agreed to carry to such point, in the absence of a stipulation that it was only to carry to the end of its own line. But defendant claims that, as it was expressly agreed by the bill of lading that its responsibility should not extend beyond its own line, it cannot be held liable for the negligence of the connecting carrier. There being no evidence to the contrary, it is clear, we think, that the contract was for a through shipment; and, this being the case, could the defendant at the same time by contract exempt itself from liability on account of the negligence of the connecting carrier? In *McCann v. Eddy*, *supra*, it was said: "We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would, in effect, operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence, without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such a qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer." In that case it is held that, in a case where property is received by a carrier for transportation from one place to another, such carrier may be held liable for the negligence of any other carrier to which such property may be delivered, unless it limits its duty and obligation to transportation over its own route, which it may lawfully do, but that such carrier cannot contract for a through shipment, as in the case at bar, to a point beyond its line, and at the same time exempt itself from liability for the negligence of the connecting carrier which completes the transportation. It was held in *Railroad v. McCann*, *supra*,

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that the statute, as interpreted by this court in the same case, could not be held to be repugnant to the Constitution of the United States.

It is said that there was no conversion of the corn by defendant's connecting carrier, and that the verdict should have been for defendant. The evidence, however, showed that Marshall & Antles had sold the corn to the Little Rock Grain Company, and, not having been paid for it, and not wishing the corn delivered without receiving pay, attached a sight draft to the bill of lading, and sent said draft, with the bill of lading attached, to a bank in Little Rock for collection from the Little Rock Grain Company, so that the grain company could not get the car of corn without paying the draft. But when the car of corn arrived at Little Rock the agent of the Cotton Belt Line, which line of road the defendant selected as its connecting carrier to Little Rock, delivered the car of corn to the Little Rock Grain Company, when the Little Rock Grain Company did not hold the bill of lading for the same; said bill of lading having been attached to the sight draft, which had not been taken up by the Little Rock Grain Company; the Little Rock Grain Company having refused to pay the draft. The Cotton Belt Road was protected by a bond of the Little Rock Grain Company, so that, if it became liable on account of delivery without the bill of lading, it would be indemnified. After inquiries had been made of defendant railroad company, plaintiff was notified by the local agent of the defendant company that the corn had been delivered to the Little Rock Grain Company. It refused then to have anything further to do with the corn, which was afterwards redelivered by the Little Rock Grain Company to the Cotton Belt Railroad Company, which company stored it in a public warehouse. There can be no question but that the shipper of goods has the right to designate the consignee, or, in other words, the person to whom they are to be delivered, and that the carrier is bound to obey the direction of the shipper, or to comply with the terms of his contract of shipment in this respect, and, if he disobeys them, he is liable as for a conversion. *Wiggins Ferry Co. v. C. & A. Ry. Co.*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; *Jeffersonville R. Co. v. White*, 6 Bush, 251. A misdelivery by a carrier of an article intrusted to him to be carried is a conversion. *Clafin v. Boston & Lowell Railroad Company*, 7 Allen, 341; *Bishop on Noncontract Law*, § 405. Nor does the fact that the railroad company offered to return the corn after it had been redelivered back again into the cars furnish any justification for the conversion, though it might be considered in mitigation of damages. *Sparks v. Purdy*, 11 Mo. 219.

A final contention is that the court erred in excluding competent and relevant testimony offered by defendant, and in admitting, over defendant's objection, incompetent and irrelevant testimony offered by plaintiff. The first conten-

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tion is predicated of the fact that upon the cross-examination of the plaintiff Marshall, who testified as a witness in behalf of plaintiffs, defendant's attorney asked him if he was not notified from time to time, or if he did not know, that the car of corn was still at Little Rock, at his final disposal. This was objected to by plaintiff's attorney as immaterial, and the objection sustained. The objection was, we think, well taken, for, as we have held, when the corn was once converted by defendant, nothing that was thereafter done or offered to be done by defendant could have the effect of relieving it from its liability for the conversion. Nor was error committed, for like reason, in excluding evidence offered by defendant to the effect that it was customary for defendant's connecting line at Little Rock to store corn in a warehouse, awaiting the demand of the bill of lading. It was immaterial. On the redirect examination of plaintiff Marshall, his attorney asked him what was meant by "free time," as used by railroads and shippers of grain. This question was objected to upon the ground that it was immaterial, but the objection overruled, and the witness answered. That this testimony was immaterial, and should not have been admitted, we think clear, but we are unable to see in what way the jury could have been misled or the defendant prejudiced by it, and do not, therefore, think the judgment should be reversed upon that ground.

Our conclusion is that the judgment should be affirmed, and it is so ordered. All concur.

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(*Supreme Court of Pennsylvania, Feb. 23, 1903.*)

[54 Atl. Rep. 580.]

Mandamus to Carrier—Refusal to Furnish Cars.*

After plaintiff has opened a coal mine on the line of an existing railroad, which furnishes him cars for a certain period, and then refuses

*As to remedies to compel carrier to furnish facilities, see monograph, 1 R. R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134; *United States v. Norfolk & W. Ry. Co.* (W. Va.), 3 R. R. R. 19, 26 Am. & Eng. R. Cas., N. S., 19; *Chicago & A. R. Co. v. Kuckkuck* (Ill.), 5 R. R. R. 91, 28 Am. & Eng. R. Cas., N. S., 91 (under N. Y. Laws 1890, ch. 565); notes, 6 Am. & Eng. R. Cas., N. S., 258; 12 Am. & Eng. R. Cas., N. S., 242; 11 Am. & Eng. R. Cas., N. S., 75; *Louisville, etc., R. Co. v. Pittsburg, etc., Coal Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 332 (mandatory injunction to compel carrier to furnish cars); *Cumberland Tel. & Tel. Co. v. Morgan's L. & T. R. Co.* (La.), 13 Am. & Eng. R. Cas., N. S., 71; *Atty. Gen. ex rel. Moore v. American Exp. Co.* (Mich.), 13 Am. & Eng. R. Cas., N. S., 95; *State ex rel. Smart v. Kansas City, S. & G. Ry. Co.* (La.), 14 Am. & Eng. R. Cas., N. S., 461; *Cleveland, C., C. & St. L. Ry. Co. v. People ex rel. Jett* (Ill.), 14 Am. & Eng. R. Cas., N. S., 846; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* (Ill.), 12 Am. & Eng. R. Cas., N. S., 227; *Sherwood v. Atlantic & D. R. Co.* (Va.), 6 Am. & Eng. R. Cas., N. S., 670; *State ex rel. Cumberland, T. & T. Co. v. Tex. & P. Ry. Co.* (La.), 18 Am. & Eng. R. Cas., N. S., 399.

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to furnish then unless he sells his coal, at a rate much below the market price, to a company controlled by the president of the railroad company, plaintiff can bring mandamus to compel the railroad company to furnish him cars, without the intervention of the Attorney General.

Same—Same.

In mandamus by a coal miner to compel a railroad company to furnish cars, which it had refused to do unless he sells his coal to a company controlled by the president of the railroad company, it is immaterial that other shippers were refused cars for the same reason.

Venue.

Where a railroad company constructs and operates its railroad wholly within Clearfield county, where its operating officers dwell, but it has its principal office in Philadelphia, mandamus proceedings may be instituted against the company in either county.

Appeal from Court of Common Pleas, Clearfield County.

Application by C. D. Loraine for writ of mandamus to the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company. From a judgment refusing the writ, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, MESTREZAT, and POTTER, JJ.

David L. Krebs, and Murray & Smith, for appellant.

Oscar Mitchell and Harry Boulton, for appellee.

DEAN, J. The defendant company was chartered some time before 1897 under the general railroad act of 1868, as the Altoona & Phillipsburg Connecting Railroad Company. In the year 1897 it was leased to the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company, the principal line of which last-named road extended beyond the boundaries of Clearfield county; but the Altoona & Phillipsburg, the lessor road, was wholly within that county. The lessee road was only a project—was never constructed, and existed only on paper. The lessor road was actually constructed for about 12 miles to connections with the Beech Creek and Pennsylvania Railroads, and was in operation between those points, carrying freight and passengers. It owned about 300 coal cars, for the transportation of coal upon its 12 miles of line to the through roads with which it connected. Along these 12 miles were several coal-mining plants in active production, which could reach the market in no other way than over this short railroad. Among them was plaintiff's, fully equipped and in active operation, mining and shipping coal to market. While in the active pursuit of his business, plaintiff avers that on November 19, 1902, by written communication from defendant company, through its superintendent, he was notified, in substance, that on and after the 20th of that month no more cars for shipment of his coal would be furnished him unless he sold it to the American Union Coal Company. This latter company at the time offered to pay him \$1.50 per ton for coal delivered on cars at his mine, while in the market it was worth \$3. This offer he declined. Since that time defendant has refused to furnish him cars. He therefore prayed the

court of common pleas of Clearfield county for a mandamus on defendant, requiring it to place cars upon his siding for coal shipment as before November 19, 1902, as it is legally bound, as a common carrier, to do. On this petition the court awarded a writ of alternative mandamus, directed to defendant, which was served by the sheriff on defendant by delivering personally, within his bailiwick, to the superintendent company of defendant company, a copy of the writ. No answer was made to the averment of facts in the petition by defendant. It moved, however, to quash the writ, mainly on two grounds: (1) Because the writ was prayed for in the name of a private individual, to enforce a public duty; and (2) because the defendant is not a corporation within the county of Clearfield, under the act of June 8, 1893, and therefore the court of Clearfield county had no jurisdiction to entertain the petition or to issue the writ. Thereupon the court dismissed the petition.

The facts as stated in the petition, in their full scope, must be taken as averred by plaintiff, for they are not denied by defendant. Therefore the first and main question is, can the plaintiff ask, on his own complaint, for the issue of the writ, without the intervention of the Attorney General? We concede that there is apparent conflict in the decisions—not, however, in the principle on which they are based, but in the application of the principle to the varying facts of different cases. The test of right of a private relator to the writ is not, as stated by appellee, whether the duty sought to be performed be a public one, but whether the complainant by breach of the public duty has suffered an injury special and peculiar to himself. The defendant, under the statute from which it derives its being, is a common carrier, and as such has imposed upon it certain public duties, such as to construct its road, to equip it with cars and locomotives, and employ hands to run them for all the public. This is a public duty. If it fail in performing it, it fails to carry out the very purpose of its charter, and the public, without distinction, suffers by the breach of duty. In such case, both at common law and under our statute of 1893, proceedings should be instituted by the commonwealth at the instance of the Attorney General. But it is held in England that, "in general, all those who are legally capable of bringing an action are also legally capable of applying to the court of king's bench for the writ of mandamus. This is true in all cases, it is believed, where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest." *Tapping on Mandamus*, p. 28. The right is distinctly recognized in this state in *Com. ex rel. Hamilton v. Pittsburg*, 34 Pa. 496, and in many cases following it. Nor, as argued by appellee's counsel, is it taken away by our mandamus act of June 8, 1893 (P. L. 345). True, the act directs that, when the writ is sought to procure the performance of a public duty only,

the proceeding shall be in the name of the commonwealth at the relation of the Attorney General, or the district attorney of the proper county; but it also provides, in the third section, that it shall issue on the application of any person beneficially interested. While we have no doubt that these words would give standing to any one interested to make application to the Attorney General for his intervention, they just as clearly save to each person the right, existing before the act, to sue out the writ when he seeks to protect an interest special to himself, as distinct from the general public. Had this plaintiff such special interest? The defendant constructed its railway and equipped it. Plaintiff then opened his coal mine, and constructed his sidings, chutes, and tipples, with a view to shipment on this road, and no other. Defendant up to November 19, 1902, furnished him with cars. Then it peremptorily refused to perform its duty to him unless he sold his coal to another coal company at a price much below what it was worth, this latter company being controlled by the president of the railroad company. If this was not a wrong special to plaintiff, as distinguished from the public, we are at a loss to conceive what would constitute such a wrong. It is not a refusal to supply cars and motive power on the road, or to keep the road in repair. It is a refusal to carry his coal because he will not sell it at a low price to the president's coal company. As the court below, in substance, says, it was iniquitous. It, in effect, if kept up, would completely destroy his plant, with the consequent loss of his invested capital; and even if now his wrong is, to some extent, remedied, he has lost months of active business. The public duty of defendant was to carry freight and passengers. Suppose it had refused to sell him a ticket as a passenger, and notified him that such refusal would be kept up unless he sold his coal to the president's coal company; the wrong would have been a violation of a duty which defendant owed to the general public as a common carrier of passengers, but it would also have been a wrong special to himself, distinct from the public of which he was one, and from which he alone specially suffered. It would have been a demand on him to do something having no connection with defendant's business of transportation, and, if he refused, to deprive him of a right which, under the most solemn forms, it had undertaken to accord to him. And it is wholly immaterial that the defendant treated some shippers of coal along its road in like manner. The injury in each case was special. The general public—all the inhabitants of a city or township—suffer by the neglect of a municipal corporation to keep in repair its highways and bridges. The loss to some individuals of the general public by the breach of duty is much greater than to others, but this does not give a right of action to the individual who merely suffers the greater loss. But if a horse break a leg by falling into a hole, or if a vehicle be wrecked

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from the same cause, the owner suffers an injury different in kind, and a loss special to himself, for which he can sue as an individual; and, if a dozen or more persons suffered like special injury, each has his remedy by personal action. We are of opinion that on the particular facts of this case, not disputed by defendant, plaintiff's injury was different in kind, and special to himself, and that therefore he could properly seek the remedy by mandamus.

The argument that injustice may be done by the enforcement of this form of remedy is without force. If a railroad corporation, by reason of storms, floods, or other disaster, is unable to perform its duty to the public in supplying cars to shippers, or because of sudden demands, beyond what could have been anticipated by reasonable foresight and prudence, or by congestion of traffic beyond reasonable expectations, and shippers' demands cannot be immediately responded to, the court, in the exercise of a proper discretion, will refuse the writ, and leave the complaining party to his remedy at law or in equity. But here there was no room for the exercise of discretion, because the facts were undisputed, and clearly demonstrated the right of plaintiff to demand the writ.

The court below argues that, while relief in some form should be given plaintiff, it cannot be by mandamus, because the decree would necessarily be too indefinite to remedy the wrong. We do not think so. The duty and the measure of it owing by defendant to plaintiff was performed up to November 19, 1902. With its performance prior to that no complaint is made. We can see no obstacle in the way to framing a writ compelling defendant's continuance in the performance of that duty, and the court below has ample power to enforce its commands against defendant and its officers, and should see to it that its orders are obeyed.

The court below is further of the opinion that under the act of 1893 it is without jurisdiction. The words of the act give to the courts of common pleas of any county jurisdiction to issue writs of mandamus to corporations being or having their chief place of business within the county. Although defendant's charter limits extend beyond the boundaries of Clearfield county, it is constructed and operated wholly within Clearfield county, and its operating officers—the superintendent and others—are within that county. The words are, shall have jurisdiction as to "all corporations being or having their chief place of business within such county." In *Bailey v. Williamsport, etc., Railroad Company*, 174 Pa. 114, 34 Atl. 556, *Jensen v. Phila., etc., Railway Co.*, 201 Pa. 603, 51 Atl. 311, and in other cases, we endeavored to interpret these words, and held that a corporation might be subject to service in at least two places—one, within the territorial limits of the county where its roadbed and rails were laid, and where it did its carrying business; the other, where its general office was located, its books kept, and its cor-

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porate seal preserved. While it is true the words are almost a copy of those in the act of June 14, 1836, on which this court passed in *Whitemarsh Township v. Phila., etc., Railroad Co.*, 8 Watts & S. 365, decided in 1845, opinion by Justice Rogers, and where a somewhat narrower interpretation was given them, yet that decision must be taken in view of the conditions then existing. It will be noticed that in that case the road was located in but two counties—one of them, Philadelphia, where the general office and chief place of business was established, and where nearly all the business was transacted. The court says that the last words of the section, "chief place of business in the county," mean that where the road runs through more than one county, and has its chief place of business in but one of them, service must be had in that one. But the act of 1893 must be interpreted in view of conditions existing when it was passed, with carrying corporations and mining and manufacturing corporations located in the interior of the state, and to a large extent doing business there; still having a principal office located hundreds of miles distant, in Philadelphia. In this act the words mean that service can be had either where the office is located, or in the county where the corporation is located and has its being. In this case the plaintiff might have applied for his writ in Philadelphia, where defendant has its office, or he could do as he has done—commence proceedings in the courts of Clearfield, where the corporation is located.

The decree of the court below is therefore reversed, and it is directed that a mandamus issue from that court as prayed for by plaintiff.

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(*Supreme Court of Montana, June 1, 1903.*)

[72 Pac. Rep. 642.]

Contract of Shipment—Action for Violation—Complaint.

The complaint in an action against a carrier for violations of a special contract of shipment must set out the contract either in substance or in *hæc verba*, and must declare upon it.

Action in Tort against Carrier—Breach of Common-Law Duties—Complaint.

The complaint in an action in tort against a carrier for a breach of its common-law duties in the shipment of goods must allege facts which will show, not only the rights of the shipper, but the duties of the carrier as well.

Same—Delay—Injury to Sheep from Exposure—Sufficiency of Complaint.

A complaint which alleges that defendant, a common carrier, promised to provide cars for the transportation of plaintiff's sheep, and to transport them with due and reasonable speed; that it, in disregard of its duties as a common carrier, negligently delayed the commencement of the transportation until a certain date, when it willfully, negligently, and wrongfully loaded the sheep, and commenced their transportation, though it had knowledge that a violent storm was

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then prevailing along its line of railroad; and that it, in disregard of its duties as a common carrier, willfully, wrongfully, negligently, and carelessly delayed the sheep along the route, and exposed them to the severe weather, and negligently refused to protect them—states a cause of action in tort.

Breach of Carrier's Common-Law Duties—Remedies Limiting Liability.*

Where a common carrier, accepting property for transportation, commits a breach of its common-law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with the obligations imposed by law, and the special contract merely constituting a defense in so far as the exemptions from liability which it creates are valid.

Action in Tort against Carrier—Delay in Transportation of Sheep—Evidence.

In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars.

Same—Same—Measure of Damages—Stipulation as to Value.*

Where a contract for the transportation of sheep by a common carrier fixes a valuation on the sheep per head, the measure of the liability of the carrier for damages resulting from a breach of its duties causing injury to the sheep is the amount of the actual damage not exceeding the stipulated valuation per head.

Carriage of Freight—Delay—Power to Limit Liability—Statutes.

Civ. Code, § 2876, provides that the obligations of a common carrier "may be limited by special contract." Section 2877 declares that a common carrier cannot be exonerated, by an agreement made in anticipation thereof, from liability from gross negligence, fraud, or willful wrong of himself or servants. Section 2912 provides that a common carrier is liable for delay only where it is caused by his want of ordinary care and diligence: *held* that, since section 2912 is a legislative declaration as to when a carrier shall be liable for delay, and is a limitation on the general power to contract given by section 2876, a common carrier cannot by special contract limit its liability for delay in the transportation of property arising from its own or its servants' negligence.

Same—Same—Liability.

Where property delivered to a carrier for transportation is injured as a result of negligent delay on the carrier's part, the shipper, free from negligence on his part, is entitled to compensation for the damages sustained by reason of such delay.

Injury to Live Stock in Transit—Negligence—Burden of Proof.†

Where animals delivered to a common carrier for transportation are injured during the transportation, and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.

*As to whether carrier's liability may be limited, see preceding case and foot-note.

†As to the burden of proving negligence where the shipper accompanies his stock, see note, 18 Am. & Eng. R. Cas., N. S., 424; Louisville & N. R. Co. v. Harned (Ky.), 1 R. R. R. 115, 24 Am. & Eng. R. Cas., N. S., 115.

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Same—Defenses—Snow Blockades—Knowledge of Storm—Sufficiency of Evidence.

In an action against a common carrier for injuries to sheep transported by it caused by its negligent delay in their transportation and by exposing them to severe weather, defendant's witnesses testified that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing along its line of road. Plaintiff denied receiving this information: *held*, that the evidence warranted an instruction that if the carrier, at the time of accepting the shipment, knew of the storm along its line, and did not inform plaintiff thereof, it could not excuse the delay by showing that its track was obstructed by snow blockades.

Same—Same—Same—Same.†

A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.

Same—Notice of Claim.

A special contract with a railroad company for the transportation of property required that in case of loss or claim for damages the shipper should give notice in writing to it. The railroad received information of the injury to the property by letter, and the railroad department called for information regarding the same shortly after the shipment was made: *held* a sufficient notice when not objected to.

Conflicting Evidence.

Where the evidence is conflicting, the verdict will not be disturbed.

Same—Damages—Expenses.

In an action against a common carrier for injuries to sheep transported by it, caused by negligent delay in their transportation and by exposing them to severe weather, the shipper testified that there was a shrinkage of the sheep during the transportation of 33 pounds per head, or 25 pounds in excess of a reasonable shrinkage; that it was necessary to feed them four days at the place of delivery before selling them, while feeding them once only might have been necessary if they had been delivered in good condition; that the cost of so feeding them was \$240, and the cost of one feeding was \$40; that the sheep were weighed before and after they were fed this extra \$200 worth of food. It did not appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage: *held*, that an instruction authorizing a recovery of the expenses for feeding rendered necessary by reason of the condition of the sheep at the place of delivery was erroneous, as allowing double damages.

Commissioners' Opinion. Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

Action by H. H. Nelson against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, unless plaintiff consents to modification by deducting certain sum from amount recovered.

A. J. Shores and I. Parker Veazey, for appellant.

G. M. Nelson, Wm. G. Downing, and H. G. McIntire, for respondent.

POORMAN, C. This action is brought to recover damages claimed to have been sustained by the plaintiff as a

†See monograph appended to Carter v. Wilmington & W. R. Co. (N. Car.), 1 R. R. R. 131, 24 Am. & Eng. R. Cas., N. S., 131.

shipper of live stock over defendant's line of railroad. The pleadings filed by the parties are substantially as follows, in so far as it is necessary to consider the same and the questions raised in this case:

The first three allegations of the complaint are to the effect: That plaintiff is a resident of Montana. That defendant is a corporation duly incorporated, and was at the time operating a line of railroad from the city of St. Paul westward through the states of Dakota and Montana into the city of Seattle. That the defendant was a common carrier, transporting merchandise and live stock, for hire, over said line of road, and over other lines of road between the city of St. Paul, Minn., and the city of Chicago, Ill. (4) That it was the duty of defendant to provide suitable cars for the transportation of live stock when requested so to do. (5) That prior to the 16th day of November, 1896, the defendant promised, as such common carrier, to provide cars and to transport for plaintiff from Culbertson, Mont., to Chicago, Ill., 2,889 head of sheep on said day. (6) That at Culbertson, on November 16, 1896, the plaintiff delivered to defendant the said sheep, and that the same were in sound and marketable condition; that the defendant then and there received the same as such common carrier, and promised, for a certain reward, to transport the same to the city of Chicago. (7) That defendant, as such common carrier, promised to transport the said sheep with all due and reasonable speed, and within the usual and customary time required for such transportation. (8) That it was the duty of defendant, as such common carrier, to complete said transportation within four days, and that the same could have been done with the exercise of due and reasonable diligence. (9) That defendant, in disregard of its duties as such common carrier, willfully, wrongfully, and negligently kept and detained said sheep at said Culbertson until the 26th day of November, 1896. (10) That on November 26, 1896, a violent storm was prevailing along the line of said railway, which was known to the defendant; that it was then known to the defendant that it could not safely transport and carry said sheep, and that defendant's line of road was obstructed and blockaded; that defendant willfully, negligently, and wrongfully caused the said sheep to be loaded into its cars at Culbertson, of which the plaintiff had no notice or knowledge. (11) That defendant, disregarding its duties as such common carrier, willfully, wrongfully, negligently, and carelessly delayed the said sheep and the train from time to time along said route, and wrongfully and negligently exposed the same to severe cold weather, and negligently refused and failed to protect said sheep. (12) Said sheep, being so improperly and unnecessarily delayed by the negligent acts of defendant, never reached said city of Chicago, but were delivered to plaintiff at South St. Paul. (13) That by reason of the careless and negligent acts of

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defendant 40 of said sheep died, and that they were worth \$3.15 per head at the point of shipment. (14) That the balance of said sheep, by reason of the negligence of defendant, suffered very great injury, and were reduced in value, to the plaintiff's damage in the sum of \$4,052.67. (15) That plaintiff was damaged in the sum of \$396 by reason of the extra care and expenses in caring for said sheep, and that said expense was occasioned solely by the negligence of the defendant. (16) That by reason of the willful, wrongful, and negligent omissions of defendant plaintiff was damaged in the sum of \$4,574.67. Plaintiff prays judgment for said sum.

To this complaint the defendant filed an answer admitting the allegations of the first three paragraphs, and denying in toto paragraphs 5, 6, 7, 8, and 9. Defendant further admitted the occurrence of the storm referred to in the complaint, and that its line of road was obstructed between Culbertson and St. Paul, but alleges that the same was known to plaintiff at the time said sheep were loaded; denies that defendant loaded the sheep, but alleges same were loaded by plaintiff. The special contract is then set up in the answer entered into between the parties on the day of shipment, providing in substance as follows: Admitting the receipt of the sheep by the defendant upon the terms and conditions of this contract, and that the same were accepted by the shipper as just and reasonable in consideration that the first party will transport the live stock at the rate named, and furnish transportation as provided in the regulations. (1) "That said railway company shall not be liable for the loss or death of, or for any injuries received by, any such stock, unless the same is immediately caused by the actionable negligence of said company, its agents, servants, or employees." (2) That said party agrees to load, unload, and reload at his own expense and risk, and to feed, water, and tend the same at his own expense and risk, while in the stockyards of defendant awaiting shipment, or while the cars are at feeding or transfer points. (3) Said second party assumes all risk of loss resulting from the failure of defendant to water said sheep when such failure is caused by the freezing of water pipes, and assumes all risk of damage from any failure in feeding, watering, or tending said stock, of whatsoever nature or kind, not resulting from negligence of defendant. (5) Said second party accepts the cars provided for transporting said stock as being sufficient therefor, and assumes all risk of damage by reason of delay in such transportation not resulting from the willful negligence of the said railway company or its agents. (6) In case of loss or claim for damage said second party shall give notice in writing to defendant within 15 days after such loss or damage has occurred. (7) "And it is hereby further agreed that the value of the live stock so transported under this contract shall not exceed the following mentioned sums: . Each sheep two and 50-100 dollars; such valuation

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being that whereon the rate of compensation to the railway company for its services and risk connected with said property is based." (8) Such values being the true values of such live stock, and this contract being entered into relying upon such values so given, as being the just and true values. (10) Provides that defendant shall not be liable beyond the line of its own railway, and that this contract shall inure to the benefit of each and every carrier beyond the route of said first party; and that shippers are required to state actual value at the time and place of shipment. In case of loss the company will only be liable for the value so given. Defendant further alleges that this was the only contract entered into relative to the shipment of said stock, and that the same was accepted under the terms of said contract; but that it was finally agreed that the sheep should be delivered to plaintiff at South St. Paul, instead of at Chicago. Defendant further alleged that it fully complied with and performed all the terms and conditions of said contract, that it was not guilty of negligence in any manner, and that the injury and death of said sheep were caused by the negligence of the plaintiff. Defendant then sets up a counterclaim of \$160 as advance charges for hay alleged to have been furnished in the feeding of said sheep. Defendant further alleged that in pursuance of said contract it furnished free transportation for four men to accompany said sheep and to care for the same.

To this answer plaintiff filed a replication denying the facts therein stated.

At the trial of the case special questions were submitted to the jury, on which they found: (a) That the injury to the sheep in question was attributable to the fact that they were exposed to cold and stormy weather. (b) That said injury was caused by such exposure. (c) That the same was attributable to the negligence of defendant. (d) That defendant did not notify plaintiff of the prevalence of a storm along the line of its railway. (e) That when the sheep reached South St. Paul they had not shrunk or suffered materially from lack of food. (f) That the train dispatcher was guilty of gross negligence in delaying the train at Williston.

A verdict was rendered for plaintiff for \$2,424.67. Judgment was entered thereon. From this judgment and the order of the court overruling defendant's motion for a new trial defendant appeals.

It was established at the trial that plaintiff did load the sheep on the cars at Culbertson, that he did enter into the contract set up in defendant's answer, and that the sheep were turned over to him at South St. Paul with his consent.

1. The trial court held this complaint to be one in tort, rather than on contract, and permitted plaintiff to introduce evidence to establish a cause of action upon that theory. This the defendant assigns as error, claiming that the complaint sets up a special contract, and that the action is one

ex contractu, and not *ex delicto*. This objection strikes at the very foundation of the action, and will be first considered. That actions on contract and actions in tort cannot be united is elementary. The one is based upon the violation of a contract made by the parties thereto; the other is based upon the violation of duties and obligations determined, not from the form or contents of any contract, but from the policy of the law. If this complaint is based upon a private contract, of which the parties, and not the policy of the law, are the authors, this action must fail, for no such private contract was proved. And in this we are considering the complaint alone, and not the subsequent pleadings. In actions by a shipper against a common carrier for violations of a special contract of shipment, it is necessary for the complaint to set out the contract either in substance or in *hæc verba*, and to declare upon it. And where the action is in tort, based upon a violation of the carrier's common-law duty, it is still necessary for the plaintiff to state facts which show, not only his rights, but the duties of the carrier, in the premises, before he can complain of any breach of duty on the part of the carrier. Both these forms of actions are, in effect, based upon violations of contracts. The one upon the violation of an express contract made by the parties themselves is called an action "*ex contractu*," and where it is sought to combine in the same action charges against the carrier for violations of a special contract and also for violations of his common-law duties the action is called "*ex delicto quasi ex contractu*." The other form of action, based upon violations of the implied contract declared by law, is called an action "*ex delicto*," or in tort. It is frequently difficult to determine from an examination of the complaint whether the action is on contract or in tort; that is, whether it is meant to charge the carrier with a violation of the express contract made by the parties, or a violation of the implied contract made by the law. The statute, in abolishing all forms, and requiring actions to be brought on the "facts constituting the cause of action," have increased, rather than diminished, this difficulty, by removing the guide furnished by the *indicia* of the common-law forms. The implied contract created and declared by law relative to the duties and liabilities of a common carrier is so complete within itself that there is little necessity for any additional contract between the parties, unless the carrier desires to limit his liability; and so usual is it for shippers to rely upon this contract created by law in actions against carriers that it has been held that "tort is the natural and habitual foundation of an action for the breach of the ordinary contract of carriage, and the declaration will be so construed unless the facts of the case clearly show that the plaintiff has elected to sue on the contract." *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.* (C. C.) 21 Fed. 896, and cases there cited.

The question here under consideration was discussed at

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some length in the case of *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465, and the general result there reached was that, notwithstanding there was in that case a suit founded upon a special contract of carriage, yet in the very nature of the action it was such that, essentially, whatever its form, it was founded in tort. In *Bryant v. Herbert*, 3 C. P. Div. 189, the same rules of discrimination were applied in testing the form of an action, but with a contrary result. Justice Hammond, in commenting on the decisions in the last two cases cited, says: "These two cases establish that in solving a question like this we are to look to the requisite natural remedy the plaintiff is entitled to on the facts he states, rather than any form his declaration may assume; though, of course, we cannot wholly disregard the form of the declaration." *Whittenton M. Co. v. M. O. R. P. Co.*, supra. It has been decided that a mere averment of a promise, or the use of the words "agreed, understood, or promised," does not make the declaration one in contract; but the averment must be one of promise, and a consideration therefor, to make it a count on contract. *Whittenton M. Co. v. M. O. R. P. Co.*, supra; 3 Enc. P. & P. 822. There may be an averment of a consideration for assuming the duty imposed by law as a matter of inducement, and as showing a compliance by the shipper with his duty in this regard, for the carrier is under no obligation to transport goods gratuitously. Wherever the gravamen of the complaint is solely for a neglect of duty imposed upon the carrier by law, the action is in tort. And even where there is a special contract varying and limiting the carrier's common-law liability, the plaintiff had an election to bring his action on the contract or to sue in tort for damages for negligence. 3 Enc. P. & P. 821, 822, and cases cited.

There can be no uncertainty as to the cause of action set forth in this complaint. It is based upon a violation of the defendant's duties as a common carrier. The complaint is given in substance in the statement of facts, and, when examined in the light of the authorities herein cited, we believe that but one conclusion can be reached. Complaints similarly drawn have been held to state causes of action *ex delicto* in the following cases: *Bowers v. R. & D. R. R. Co.*, 107 N. C. 721, 12 S. E. 452; *Rideout v. M., L. S. & W. R. Co.*, 81 Wis. 237, 51 N. W. 439; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; *Smith v. C. & N. W. Ry. Co.*, 49 Wis. 443, 5 N. W. 240, 1 Am. & Eng. R. Cas. 303; *Stockton v. Bishop*, 45 U. S. 155, 11 L. Ed. 918; *Flynn v. H. R. R. Co.*, 6 How. Prac. 308.

2. The appellant claims that the court erred in not sustaining its contention that there is a variance between the cause of action pleaded and that proved. This contention is based upon the theory that the defendant, being charged with liability growing out of a breach of its common-law duties, and

the court having found that the special contract pleaded in defendant's answer covering this shipment was entered into by the parties, the plaintiff cannot recover, as to permit plaintiff to do so would constitute a material variance between the cause of action pleaded and the one proved; that it would be a departure from fact to fact and from law to law—that is, that the plaintiff, in recovering, would be recovering upon the special contract set up in the answer, instead of the implied one pleaded in the complaint. As before stated, the policy of the law declares a contract between the shipper and carrier which is complete within itself. This contract, thus declared, is ever present. True, it may be modified by special agreement, but modified only. It cannot be wholly annulled. It is the policy of the law, growing out of the character and necessity of the employment of the common carrier. It is equally binding upon the shipper and carrier, and cannot be modified except as permitted by provisions of law. Ordinarily, a written contract between parties includes the entire subject-matter, and furnishes the whole measure of liability and obligation upon each side. But this is not necessarily so in the case of a contract between a shipper and a carrier, and it is seldom that a written contract can cover the whole subject-matter of their respective rights and obligations, for the reason that duties are imposed by law upon the carrier which cannot be affected by stipulation. The special contract may touch upon only a few of the grounds upon which an action may be based, and such is the case with the special contract set out in the answer. It does not, if such could be done, change or attempt to change the relation from common carrier to private carrier. Suppose the special contract entered into between the shipper and the carrier provides that the shipper shall attend, water, and feed the stock. This relieves the carrier from all duty and obligation respecting these particular matters, but does not relieve it of the duty imposed by law of properly handling its trains, and of affording reasonable facilities for enabling the shipper to give the stock proper care and attention. The carrier, through its negligence, either ordinary or gross, does not handle its trains in a proper manner, does not afford these facilities, and damage results therefrom. In such a case, must the shipper bring his action on the special contract? Can he maintain an action on the contract for the violation of duties with respect to which the contract is wholly silent? The answer to this latter question is obvious. The shipper could not maintain an action for the violation of certain terms and provisions of a contract unless those terms and provisions were a part of the contract, and under the theory advanced by the appellant he could not maintain an action on the case for the reason that a special contract existed. He would, therefore, have no redress. Every cause of action must rest upon some duty shown to exist and a breach of the same. Where the

action is based upon the violation of the terms of a special contract, defendant cannot be held liable for any acts of commission or omission not therein incorporated or included. Consequently there could be no breach of duty. To give the shipper any right of action in such a case, it would be necessary that the special contract be to that extent ignored. The carrier must be charged with the violation, not of the terms of a special contract, but with the violation of the duties imposed upon it by law. A carrier, in accepting shipments, always accepts them subject to the liabilities imposed by law. The only way in which it can at all vary or limit this liability is by special contract. The effect of the special contract is, therefore, merely to create and define certain cases and conditions under which its full common-law liability shall not attach. The special contract is the evidence of such exception, and to the extent to which it is valid constitutes a defense, and as such must, therefore, be pleaded as a defense; the burden of proof resting on the defendant to establish it. *Atchison, Topeka & S. F. Ry. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833. The plaintiff consequently recovers from the defendant, if recovery is had, by reason of its common-law liability as a carrier, notwithstanding the special contract, unless the defendant shall, as a matter of defense, show that it has escaped its common-law liability under and by reason of the contract.

The special contract is pleaded as a defense, and not in bar. We are aware that the decisions on this question are somewhat at variance, but believe the better rule to be that the existence of a special contract for the shipment of live stock, with stipulations therein exempting the carrier from certain liabilities, is no obstacle to the maintenance of an action in tort, based upon the violations of the carrier's common-law liabilities, and that the plaintiff has an election to bring his action on the contract or in tort for damages arising from a violation of the carrier's duties. *Nicoll v. East. Tenn., etc., R. Co.*, 89 Ga. 260, 15 S. E. 309; 3 Enc. P. & P. 823; *Witting v. St. Louis & S. F. Ry. Co.*, 28 Mo. App. 110; *Coles v. Louisville, etc., Ry. Co.*, 41 Ill. App. 607; *Arnold v. I. C. R. R. Co.*, 83 Ill. 273, 25 Am. Rep. 386; *Clark v. Ry. Co.*, 64 Mo. 440; *Minn., St. P., etc., Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132; *Hutchinson, Carriers*, §§ 748, 749; *City of Champaign v. McMurray*, 76 Ill. 358; *Michalitschke v. Wells Fargo Co.*, 118 Cal. 687, 50 Pac. 847.

3. Defendant next assigns as error the refusal to give its requested instructions Nos. 1, 2, 3, and 4. Evidence was admitted relative to the agreement or duty of the defendant to provide cars on the 16th day of November, 1896, for transporting the sheep, and as to the care and feed of the sheep at Culbertson between that day and the time of shipment on November 26th; and also as to the conversation had between

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the plaintiff and one J. W. Donovan, train dispatcher at Great Falls. This testimony was permitted to go in without objection, until the plaintiff, then testifying as a witness in his own behalf, was asked as to whether, while at Culbertson, he was put to any expense in connection with the keeping and care of the sheep that would not have been incurred had the shipment been made as soon as they were delivered there. This evidence was objected to, and the court then held the action to be in tort, and that defendant was not liable for any loss or damage prior to the day when the sheep were loaded on defendant's cars. Subsequent to this ruling the court permitted plaintiff, over the objection of the defendant, to testify as to damages sustained by reason of the shrinkage of the sheep while at Culbertson, and prior to November 26th, the date of loading; the plaintiff testifying that he had suffered damage in the sum of \$356.12 by reason of such shrinkage. On cross-examination counsel for defendant asked the witness substantially the same questions relative to his conversation with Donovan, and as to the care and feed of the sheep at Culbertson prior to the day of shipment. These requested instructions are, in substance: (1) That defendant never agreed to have cars at Culbertson on November 16th. (2) That defendant was not charged with any duty to have cars at Culbertson on November 16th, and the jury cannot allow plaintiff damages by reason of the failure of defendant to furnish cars on that day. (3) The defendant was not to blame for shrinkage prior to November 26th, and is not responsible therefor. (4) That the evidence does not justify recovery of damage on account of any act of defendant prior to the time of loading. The court refused to give these instructions, but, in lieu thereof, instructed the jury as follows: "You will disregard the claim of the plaintiff of \$356.12 for damages alleged to have been sustained by the sheep while at Culbertson, as plaintiff cannot recover for that under the allegations of this complaint." This instruction withdrew from the consideration of the jury all damage sustained prior to the loading of the sheep on the defendant's cars, and was, in our judgment, amply sufficient to protect the defendant, and to inform the jury that the plaintiff was not entitled to anything on account of expense or shrinkage while the sheep were at Culbertson.

Defendant claims that it was acting on the theory that the action was on contract, and was misled thereby, and permitted the evidence to go in without objection. Conceding this to be a fact, plaintiff cannot be prejudiced by reason of defendant's error in taking the wrong theory of the case. The plaintiff had a right to show the condition of these sheep at the time they were shipped. Introducing evidence as to the treatment and food received immediately prior to the shipment was one way of showing it. Whether the correct way or not, it was done without objection, and we fail to un-

derstand how defendant was prejudiced thereby under this instruction.

4. The action of the court in giving its instructions Nos. 12, 13, and 15, and in refusing to give defendant's requested instructions Nos. 10, 11, and 13, is next assigned as error. The instructions given were framed upon the theory that, notwithstanding the valuation of \$2.50 per head, placed upon the sheep at the point of shipment by paragraph 7 of the special contract, plaintiff was entitled to recover the full amount of damage sustained by reason of injury, not exceeding that amount per head. At common law the carrier is liable for the full amount of the damage resulting from his negligence. This liability may be limited by an express agreement made between the shipper and the carrier at the time of the delivery of the goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. *Hart v. Pa. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, 18 Am. & Eng. R. Cas. 604; *Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Squire et al. v. N. Y. Cen. R. R. Co.*, 98 Mass. 244, 93 Am. Dec. 162. And where the parties have, by stipulation, fixed upon a value of the property, such stipulation has the effect of limiting the liability of the carrier, and is, to that extent, a defense to an action for damages. The value of the stock at the place of shipment and its value at the place of destination may be, and usually are, different. The cost of transportation paid by the shipper would seem to indicate that in such amount, at least, the stock had a greater value at the place of destination; else there would be little motive in making the shipment at all. The uncertainty of market conditions renders it difficult, if not impossible, to fix with precision the value the stock will have when the place of destination is reached. The value then agreed upon, unless the stipulation provides otherwise, has reference to the time and place of shipment. This value so fixed, whether for the purpose of obtaining shipping rights and concessions or as the true value of the property, has, in the absence of limitations thereto, the effect of fixing the limit to the carrier's liability, whether from loss or injury. No question is made as to the liability of the carrier for the full value of the property so fixed in case of total loss, but it is claimed that in case of injury the carrier is liable for only a proportion of the amount, taking the stipulated value as the basis of calculation. To say that the phrases "loss of property" and "injury to property" have the same signification, is to declare them synonymous, when in fact they are not. The one means a total destruction or loss of property, the other means a partial loss or destruction; and in the case of injury a value may yet remain in the property equal to or exceeding the stipulated value. The freight paid by the shipper may equal the fixed value at the point of shipment, while the

increase or decrease in the market value of the stock pending the shipment may materially affect the value at the time the same passes into the hands of the consignee. The two cases are so dissimilar that the rules for the assessment of damages can hardly be the same and preserve equity between the parties.

As to whether a contract may provide that the carrier shall be liable only for the fixed value in case of total loss without a refund of the freight paid, is not here discussed or decided. The general rule on this subject is thus stated in the fifth volume (2d Ed.) of the American and English Encyclopedia of Law, at page 335: "Where the stipulation limits the liability of the carrier in any event to a sum named in cases of loss of the property shipped, and no loss occurs, but the property is injured, the shipper is entitled to recover damages for the injury up to the amount named, although the injured property may still be valuable. The effect of the stipulation is not to fix a limit in case of loss and a proportionate limit in case of injury, but to fix an amount which shall be the limit of recovery, whether for loss or injury." In *Starnes v. Railroad*, 91 Tenn. 516, 19 S. W. 675, the contract under which the shipment was made contained the following stipulation: "And it is further agreed that, should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack \$200, for a horse or mule \$100, which amounts it is agreed are as much as such stock as are herein agreed to be transported are reasonably worth." The court held: "The stipulation limited the liability of the defendant to \$100 (horse or mule) for each animal injured or killed; that they should assess the damage according to the real injury caused by the carrier's negligence, not in any instance exceeding \$100 per head." It adds: "The question is not 'what did each animal bring in the market in its injured condition?' but rather, 'to what extent and in what amount not above \$100 was it damaged through the fault of the defendant; not what value is left in the animal, but what elements for value were wrongfully taken away?' The agreement is that the carrier shall not be liable for more than the hundred dollars in case of damage; not that no liability shall attach if the horses, though injured, should sell for as much as that sum. The true measure of liability under the contract is the amount of actual damage resulting from the negligence of the carrier, in no case to exceed the sum stipulated. This is the most natural and reasonable construction of the contract. It is fair and just to both parties. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount named in the bill of lading as the agreed value; nor will the carrier be allowed to deny the liability for actual damages up to that amount. The carrier

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must respond for negligence up to that amount, but no further." In *Hart v. Pa. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, 18 Am. & Eng. R. Cas. 604, the contract of shipment contained a clause to the effect that the carrier assumed a liability on the stock to the extent of \$200 per head for each horse or mule shipped. One of the horses shipped was killed, another was injured. The trial court charged the jury that: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is a plain agreement that the recovery cannot exceed the sum of \$200 each for horses." This charge was sustained, the Supreme Court saying: "The limitation as to value has no tendency to exempt from liability for negligence. * * * The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that amount." In *Ry. Co. v. Lesser*, 46 Ark. 236, it was held proper to insert in the contract of shipment the provision that in case of injury or partial loss the amount of damages claimed should not exceed the same proportion. The contract before us contains no such provision, and does not contain any provision from which it can be reasonably inferred that such was the intention of the parties.

We believe the true rule of damages in such cases to be that laid down in the decisions quoted and as contained in the instructions of the court now under consideration, and this we believe to be the doctrine of the federal courts as well as those of almost all of the states. *Hart v. Pa. Ry. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, 18 Am. & Eng. R. Cas. 604, and cases there cited.

(a) Appellant further claims that the court's instructions No. 13, found on page 130 of the record, and No. 15, on page 134 thereof, are inconsistent with each other. These instructions are merely explanatory of each other, and are not in conflict. Both are based upon the theory that for injury caused by the negligence of defendant plaintiff could recover for the full amount of injury sustained, not exceeding \$2.50 per head, notwithstanding some value might still be left in the injured property. Requested instruction No. 13 is the same as the court's instruction No. 16, except as modified in accordance with the rule of law above stated; and requested instruction No. 11 is the same as the court's instruction No. 14, except the words "gross negligence" are replaced by the word "negligence" in the instruction given. Defendant's requested instruction No. 10 is the same as the instruction given by the court No. 12, except that in the instruction given the words "in case of loss" occur at the end thereof after the

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words "agreed value"; and, as these modifications accord with the view of the law herein taken, these requested instructions were properly refused.

5. Instructions Nos. 14, 15, and 18 were requested by the defendant on the theory that the contract relieved the defendant from liability resulting from delay, even though caused by its ordinary negligence. The court refused to give these instructions, and the defendant brings the question to this court. Before inquiring into the precise terms of the special contract of shipment, it may be well to first consider the proposition as to whether it is permissible, under the law, for a carrier to limit his liability to such an extent that he may relieve himself from damages resulting from his own negligence, in the matter of delay. The statute of this state permits a carrier to limit his common-law liability to the extent therein stated. Section 2876, Civ. Code, provides: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." This section standing alone would seem to confer upon the carrier the right by special contract to limit his liability, even when guilty of gross negligence. Section 2877 of the same Code, however, provides: "A common carrier cannot be exonerated by an agreement made in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of himself or his servants." This section limits the general power given the carrier by the preceding section. These two sections, construed together, give to the carrier the right by special contract to provide against liability in all cases except when it arises from his gross negligence, fraud, or willful wrong. Section 2912 of the Civil Code further provides: "A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." If this latter section is to be construed with the other two, it is a further limitation upon the power of the carrier to contract away his liability. If it is not so construed, it would be hard to define the object of the Legislature in enacting it, for it is only declaratory of rules of law already universally recognized by the courts. It is a fundamental principle and universal rule that where a statute is taken from another state it is taken subject to the interpretation placed upon it by the courts of that state, and in principle it is difficult to understand why the same doctrine should not apply when a portion of the common law is enacted as a part of the statute. In *Baker v. Baker*, 13 Cal. 87, it was held that "a statute in affirmance of the common law is to be construed as was the rule by that law." This rule of construction would, perhaps, be modified by the statutory provisions that all statutes are to be literally construed, with a view to effect their objects and to promote justice. Section 4, Pol. Code; section 4652, Civ. Code.

The very nature and necessity of the common carrier's em-

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ployment, the enormity of the carrying trade, materially affect the vital interests of the entire country, and as such give to the public an interest in the rules and laws which should govern such employment. The interests of the parties primarily affected—that is, the shipper and the carrier—in any particular instance must be held to be subordinate to the welfare of the state and the community at large. The establishment of rules which will conserve the interests of the state and community, as well as the parties, is a matter of public policy; and the parties directly interested cannot be permitted, by special agreement or otherwise, to contract away these rules of law established for the conservation of public policy. The general rule of law bearing upon this subject is stated in 5th Am. & Eng. Enc. Law (2d Ed.) 258: "The general rule is that a carrier cannot limit his liability for delay except by special contract with the shipper, and that in no event can it limit its liability for delay resulting from its own negligence." *Atchison, T. & S. F. Ry. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; *Branch v. W. R. R. Co.*, 88 N. C. 573, 18 Am. & Eng. R. Cas. 621; *Pierce v. S. P. Co. (Cal.)* 47 P. 876, 7 Am. & Eng. R. Cas., N. S., 564, 40 L. R. A. 350; *Leonard v. Chicago R. R. Co.*, 54 Mo. App. 293. In the latter case the court says: "The defendant will not be allowed the benefit of a stipulation protecting it from its own negligence." The policy seems to be, as was expressed in *Rosenfeld v. R. R.*, 103 Ind. 123, 2 N. E. 346, 21 Am. & Eng. R. Cas. 87, 53 Am. Rep. 500, "The law will not allow a common carrier to contract to be safely negligent." The common carrier may not by contract confine his liability to damages resulting from his gross negligence, or from his willful negligence with respect to matters of delay. 5 Am. & Eng. Enc. Law (2d Ed.) 459; *Shriver v. Sioux City R. R. Co.*, 24 Minn. 508, 31 Am. Rep. 353; *Orby v. Ry. Co.*, 65 Mo., loc. cit. 632; *Root v. Ry. Co.*, 83 Hun, 111, 31 N. Y. Sup. 357; *Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Alabama R. R. v. Thomas*, 83 Ala. 343, 3 South. 802; *Hutchinson on Carriers*, §§ 260-263; *Moulton v. St. Paul Ry. Co.*, 31 Minn. 85, 16 N. W. 497, 12 Am. & Eng. R. Cas. 13, 47 Am. Rep. 781. In *Hart v. Pa. R. R. Co.*, 112 U. S. 338, 5 Sup. Ct. 151, 28 L. Ed. 717, 18 Am. & Eng. R. Cas. 604, the court says: "It is the law of this court that a common carrier may, by special contract, limit its common-law liability, but that it cannot stipulate for exemption from the consequences of its own negligence and that of its servants. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *York Co. v. Central R. R. Co.*, 3 Wall. 107, 18 L. Ed. 170; *R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *R. R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *R. R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. In *R. R. Co. v. Lock-*

wood, *supra*, the court laid down the following propositions: "(1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." The power of the common carrier to limit his liability by reasonable special contract has long been recognized. The statutes of 17 & 18 Vict. c. 31, par. 7, provides, in substance, that the carrier may make such special contracts only as shall be judged to be just and reasonable by the court before which the question may arise. *Peck v. North Staffordshire R. R. Co.*, 10 H. L. Cas. 473; *Gregory v. West Midland R. R. Co.*, 2 H. & C. 944. But no contract is reasonable that is subversive of public policy. Section 2912 of the Civil Code is equivalent to saying that a common carrier shall be liable for damages resulting from delays caused by its want of ordinary care and diligence; that is, for ordinary negligence. This being a legislative declaration as to when the common carrier shall be liable for delay, it cannot be abridged by special contract. It is a legislative limitation upon the previous general power given to contract. This rule that the common carrier may not limit his liability for delay arising from his own negligence prevails in the federal, and, it is believed, in all the state, courts, except those of New York (which permit the carrier to limit his liability against his own negligence), and of Illinois and Wisconsin, which permit the carrier to limit his liability except against his gross negligence. The handling of the defendant's trains was a matter peculiarly within the power of the defendant. The shipper could exercise no control. He was bound to await the will and action of the carrier; and, if his stock was injured as a result of negligent delay on the part of the carrier, he is, in the absence of negligence or fault on his part, entitled to reasonable compensation for such damages as he may have suffered by reason of loss or injury to his stock. The terms of the special contract in this case with reference to the subject now under consideration are somewhat ambiguous, but the view of the law here taken renders it unnecessary to enter into any further discussion with reference to this contract on this subject. The court committed no error in refusing to give the instructions requested.

6. The court, by its instruction No. 6, told the jury, in substance, that if the evidence did not show that the sheep in question died or were injured from some inherent want of vitality, or by reason of injuries inflicted upon each other, or by unavoidable accident, the defendant company would be liable, unless it established by a preponderance of the evidence that the death or injury was occasioned from some other cause than its negligence; that, in the absence of such proof, the law would presume negligence on the part of the carrier

The defendant contends that, inasmuch as the agents of plaintiff accompanied this shipment, the burden was on the plaintiff to show the cause of the death and injury. This position of the defendant is untenable under the facts of this case. The fact that the shipper accompanies the stock can have no greater effect than to relieve the carrier as an insurer when the loss or injury is shown to fall within the exception named in the special contract; but in this case the complaint declares upon the carrier's common-law liability. Any exception contained in the special contract limiting this liability is a matter of defense, and the burden is upon the defendant to show that it falls within the exception. The presence of the shipper or his agents upon the train transporting the stock could not of itself have the effect of delaying the train, and could not affect the question of negligence on the part of the carrier in the matter of delay. It was the duty of the defendant to afford the shipper proper facilities for watering, feeding, tending, and caring for the stock, and to transport the stock with reasonable diligence, and with as little delay as practicable. *Edwards on Bailments* (2d Ed.) par. 581, and note. We also cite in this connection *Atchison, T. & S. F. Ry. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; *Leonard v. C. C. R. R. Co.*, 54 Mo. App. 293, 22 Am. Law Rev. 214 et seq.; *Witting v. St. L. & S. F. Ry. Co.*, 101 Mo. 634, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636. If the presence of the shipper or his agents, or their acts or conduct, had the effect of preventing the defendant from in any manner fulfilling or discharging its duties as a common carrier, the burden of proving those matters was on the defendant. Under the facts in this case, and other instructions given, we find no error in this instruction.

7. Another instruction given is as follows: "The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care." The appellant complains of this instruction for the reasons (1) there is no evidence to base it

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upon; (2) that it is an erroneous statement of the law. The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the existence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case. As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *Lamont v. Nashville R. R. Co.*, 9 Heisk. (Tenn.) 58, in which the court says: "The company were bound to take notice of the signs of approaching danger, and, if of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care." Further sustaining this general proposition of law, we cite the following authorities: *Fox v. B. & M. R. R. Co.*, 148 Mass. 220, 19 N. E. 222, 37 Am. & Eng. R. Cas. 632, 1 L. R. A. 702; *Corbett v. St. Paul, M. & O. R. R. Co.*, 86 Wis. 82, 56 N. W. 327; *Hewett v. Chicago Ry. Co.*, 63 Iowa, 611, 19 N. W. 790, 18 Am. & Eng. R. Cas. 568, 5 Am. & Eng. Enc. Law (2d Ed.) 255; *Express Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666.

8. We have examined the other instructions given as well as refused, and find no error in the action of the court with respect thereto, excepting the last part of instruction No. 15, found on page 134 of the record, which will be further considered. The objection made as to the conversation of plaintiff with Superintendent Hale is not well taken, as this evidence had a direct bearing upon the question of negligence. Nor can the objection be sustained that defendant had not received the notice specified in paragraph 6 of the special contract. The record, however, shows that such information was given to the defendant by letter, and that the railroad department called for information regarding it shortly after the shipment was made. This was a sufficient notice, unless objection was made thereto by defendant; and it does not appear from the record in the case that any such objection was made. A general discussion of this subject is found in the authorities cited. *Central Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750; *Wabash Ry. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Hess v. M. Ry.*, 40 Mo. App. 202; *B. & O. R. v. Copper*, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 586; *Kan. R. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *Owen v. Louisville R.*, 87 Ky. 626, 9 S. W. 698, 35 Am. & Eng. R. Cas. 687.

The counterclaim of defendant was submitted to the jury

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and they were told by the court in its instruction No. 17: "If your verdict upon the plaintiff's case is in favor of the plaintiff, you should deduct this amount, if plaintiff's established claim is large enough; otherwise you should find a verdict for the defendant for the balance or for its whole counterclaim." No special finding was asked or made with respect to the counterclaim of defendant, and it is impossible to ascertain from an examination of the record whether the jury wholly disregarded defendant's claim, or whether it allowed it in full, and deducted it from the amount of the verdict returned for the plaintiff.

The further contention made by the defendant that the evidence is insufficient to sustain the verdict cannot be sustained, for the reason that the testimony is conflicting on all points at issue, and this court has repeatedly held that in such a case it will not disturb the verdict or findings. The credibility and weight to be given to the testimony of witnesses is a question exclusively within the province of the jury, and the appellate court, in case of substantial conflict, has no power to disturb the findings thereon. This court cannot try the case de novo, and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses. *Baxter v. Hamilton*, 20 Mont. 334, 51 Pac. 265; *Barnett v. Brown*, 18 Mont. 369, 45 Pac. 551; *Merchants' Bank v. Greenhood*, 16 Mont. 431, 41 Pac. 250, 851; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506; *Wastl v. Mont. Un. Ry. Co.*, 24 Mont. 159, 61 Pac. 9; *State v. Howell*, 26 Mont. 4, 66 Pac. 291; *State v. Ford*, 26 Mont. 2, 66 Pac. 293; *State v. Hurst*, 23 Mont. 484, 59 Pac. 911; *State v. Allen*, 23 Mont. 118, 57 Pac. 725.

9. Plaintiff, in his testimony, stated that after leaving Culbertson the shrinkage of the sheep was 33 pounds per head, or 25 pounds in excess of reasonable shrinkage, causing a damage of 3 cents a pound through the loss of weight; and that, if the sheep had arrived at South St. Paul in good condition, it might have been necessary to feed them once before selling, but in the condition in which they were it was necessary to feed them four days before selling. The witness was then asked what the cost was of so feeding the sheep. This was objected to by the defendant as immaterial, and as not suggesting the proper measure of damages. This objection was overruled, and defendant excepted. The plaintiff, in answer to the question, stated that he expended for feeding the sheep in South St. Paul \$240; that the cost of one feeding of the sheep would have been \$40. The court, in instruction No. 15, found on page 134 of the record, used this language: "Plaintiff is entitled to recover such expenses in the way of feed as he was put to by reason of the condition of the animals in question on the arrival at their place of destination." Plaintiff further testified that "the sheep were weighed before and after they were fed this \$200 worth of

hay," but nowhere in the record does it appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage. The burden of proving damage in this regard was on the plaintiff. From his testimony the inference may be drawn that the sheep were weighed after they had been fed once, and that the cost of the first feeding, which he deemed to be necessary, was \$40, and that he was damaged in the sum of \$200 by reason of the extra feeding. This evidence on the part of plaintiff was uncontradicted, and the court in that part of the instruction given practically told the jury to allow this item of damages. If the weight of the sheep taken before the feeding of this \$200 worth of hay was used as the basis of comparison in calculating the shrinkage, it is easy to see that allowing the \$200 damages would be a double assessment of damages against the defendant; and as the burden of proving this damage, if any, was on the plaintiff, and his evidence failing to establish it, it was error in the court to so instruct the jury. It must be presumed that the jury allowed this damage, and that it is a part of the verdict rendered. The excess of damages allowed, however, is capable of definite ascertainment, and the judgment rendered may, therefore, be corrected without another trial.

Upon a thorough examination of the entire case and the law bearing thereon, we are unable to find any material error other than that just mentioned. We therefore recommend that the case be remanded to the district court, with directions to grant a new trial, unless within 30 days after the filing of the remittitur from this court the plaintiff file with the clerk his consent in writing that the judgment be modified by deduction from the amount thereof the sum of \$200, in accordance with the views herein expressed, in which event, and upon the entry of the judgment as modified, the judgment and order appealed from be affirmed. We further recommend that, if such consent in writing be filed, and the judgment be modified, then appellant shall recover one-third of the costs of this appeal; otherwise, the appellant shall recover all the costs of the appeal.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion it is ordered that this cause be remanded to the district court, with directions to grant a new trial, unless within 30 days after the filing of the remittitur from this court the plaintiff file with the clerk his consent in writing that the judgment be modified by deducting from the amount thereof the sum of \$200, and upon the entry of the judgment as modified the judgment and order appealed from be affirmed; that, if such consent in writing be filed, and the judgment modified, then appellant shall recover one-third of the costs of this appeal, otherwise the appellant shall recover all the costs of the appeal.

STAPLETON v. GRAND TRUNK RY. CO.*(Supreme Court of Michigan, May 12, 1903.)*

[94 N. W. Rep. 739.]

Carriers of Goods—Termination of Relation.*

Where the consignee of goods shipped by railroad receipted for them on their arrival at their destination, removed a part of them, and himself put the remainder up in one of the railroad company's buildings, although he could have removed them also, the railroad company was not liable for the goods on their subsequent destruction by fire.

Same—Beginning of Relation.†

When a consignor of goods delivers them to the railroad company,

*As to when the carrier's liability on account of freight terminates after its arrival at destination, see *Normile v. Oregon R. & Nav. Co.* (Ore.), 5 R. R. R. 306, 28 Am. & Eng. R. Cas., N. S., 306 (whether carrier's liability as such has ceased where it unloads a mule and secures it only to a light plow, painted red, is a question for the jury); *Bowers v. J. B. Worth Co.* (N. Car.), 22 Am. & Eng. R. Cas., N. S., 658; *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 380; *Central Railroad & Banking Co. v. Cooper* (Ga.), 2 Am. & Eng. R. Cas., N. S., 688; *Allan v. Pennsylvania R. Co.* (Pa.), 10 Am. & Eng. R. Cas., N. S., 347; *American Sugar Refining Co. v. McGhee* (Ga.), 2 Am. & Eng. R. Cas., N. S., 697 (liability of carrier where goods are refused by consignee); *Ratzer v. Burlington, C. R. & N. Ry. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 55; *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama* (Ala.), 20 Am. & Eng. R. Cas., N. S., 455 (reasonable time for removal of goods); *Berry v. West Virginia & P. R. Co.* (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103 (reasonable time for removal of goods, question of law); *Central Railroad & Banking Co. v. Cooper* (Ga.), 2 Am. & Eng. R. Cas., N. S., 688 (storage on uncovered platform); *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.* (Kan.), 2 Am. & Eng. R. Cas., N. S., 560; *Welch v. Concord R. R.* (N. H.), 16 Am. & Eng. R. Cas., N. S., 830; *Tate v. Yazoo & M. V. R. Co.* (Miss.), 20 Am. & Eng. R. Cas., N. S., 461; notes, 2 Am. & Eng. R. Cas., N. S., 722 (consignee's refusal to accept goods); 10 Am. & Eng. R. Cas., N. S., 352 (delivery of goods at flag station, contracts limiting liability); 10 Am. & Eng. R. Cas., N. S., 352 (provision that goods delivered on a certain platform, where there is no protection from weather, should be at shipper's risk); 2 Am. & Eng. R. Cas., N. S., 719; *Washburn-Crosby Co. v. Boston & A. R. R.* (Mass.), 1 R. R. R. 794, 24 Am. & Eng. R. Cas., N. S., 794 (unloading on railroad's wharf as delivery to steamship company).

†As to when the relation of shipper and carrier begins, see notes, 20 Am. & Eng. R. Cas., N. S., 463; 22 Am. & Eng. R. Cas., N. S., 90 (delivery of live stock to carrier); *Kansas City, P. & G. R. Co. v. Barnett* (Ark.), 22 Am. & Eng. R. Cas., N. S., 81 (cattle placed in railroad stock pens not delivered until received by carrier); *Texas & P. Ry. Co. v. Clayton* (U. S.), 13 Am. & Eng. R. Cas., N. S., 236 (cotton on carrier's wharf awaiting transportation by steamboat coming is in carrier's actual custody); *Kird v. New Orleans, etc., R. Co.* (La.), 20 Am. & Eng. R. Cas., N. S., 930 (freight on platform presumed to be in carrier's custody); *Southern Ry. Co. v. Wilcox* (Va.), 22 Am. & Eng. R. Cas., N. S., 260 (reasonable time of delivery to carrier); *Meloche v. Chicago, M. & St. P. Ry. Co.* (Mich.), 10 Am. & Eng. R. Cas., N. S., 82 (where goods properly marked are placed in company's freight depot for immediate shipment, and defendant's agents agree to ship them on the following morning, the carrier is liable as a common carrier); *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 380; *Missouri, K. & T. Ry. Co. v. Byrne* (Ind. Ter.), 13 Am. & Eng. R. Cas., N. S., 17 (placing cattle in receiving pens as delivery).

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relinquishing all control over them, the railroad becomes immediately liable as a common carrier; but if the goods are merely placed in the railroad company's depot for the consignor's convenience, and are not ready for shipment until the consignor has done something further to them, the railroad company is not so liable.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by W. J. Stapleton against the Grand Trunk Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. W. Meddaugh and L. C. Stanley, for appellant.
Warner & Codd, for appellee.

MOORE, J. This is an action to recover for the value of goods destroyed in a fire which burned the freighthouse of the defendant at Mt. Clemens, on Monday, the 30th day of April, 1900, at 3 o'clock in the afternoon. The plaintiff is the surviving partner of George Norris & Co., of Detroit, manufacturers and dealers in bottled drinks. This concern had been doing business in Mt. Clemens for some 20 years, and in the course of business, on the 27th day of April, 1900, had shipped a quantity of goods to their agent, Patrick Bogue, at Mt. Clemens. A part of these goods reached there on Friday, April 27th, and a part on Saturday, April 28th. Immediately thereafter the plaintiff's agent receipted for the goods, and took some of them away. The rest he put into what was called the "jail," where he had previously put goods by the permission of his son, who was also in the employ of the defendant company. He took one load away Friday, a load on Saturday, and two more on Monday. A fire occurred at 3 o'clock Monday afternoon, and goods to the value of \$144.92, as testified by plaintiff, were destroyed. There were also destroyed in this fire a number of empty bottles and cases belonging to the plaintiff, which the plaintiff claimed were of the value of \$379.35. The jury rendered a verdict in favor of the plaintiff for both lots of goods. The case is brought here by writ of error. There is no claim the fire was due to the negligence of the defendant.

In relation to the goods shipped from Detroit, the trial judge charged the jury, in part, as follows: "The consignee (that is, the receiver) has a reasonable time after the arrival of goods at their destination to remove the same. Pending their removal within such reasonable time, the liability of the railroad company is that of a common carrier, and not of a warehouseman. This reasonable time is to be judged by all the circumstances connected with the transaction—former dealings between the parties, and the ability of the consignee to remove these goods; and, if the jury find that the consignee used all reasonable diligence in removing the goods, the defendant is liable in this case, as a common carrier, for the value of the goods sent out, and your verdict should be

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for the plaintiff. That depends upon the testimony—which side you believe.” We think this an incorrect statement of the law. In *Hutchinson on Carriers* (2d Ed.) p. 440, it is said: “In New York the law upon this subject is stated to be that if the consignee is present, upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown, or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer. This view of the subject has also been taken by the courts of Minnesota and Michigan.” See cases cited in note. In the same authority, at page 445, it is said: “What length of time will be considered reasonable for the removal of the goods, at the expiration of which the carrier will be regarded as holding them as warehouseman, when such reasonable time is allowed the consignee, it is said, cannot be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case. When the facts are agreed upon or undisputed, it becomes a question to be determined by the court as one of law, but where they are disputed and unsettled the question must be submitted to a jury. It is said, however, that no indulgence will be given to the consignee by reason of the circumstances of his condition or situation, which may make delay in the removal of the goods unavoidable on his part, nor will the distance at which he may reside or have his place of business from the place of their deposit be taken into consideration, but he will be required to remove them with the same expedition as though he lived in the vicinity of the warehouse. In other words, the time within which the consignee is required to remove the goods will not be made to vary with his distance, convenience, or necessities, but only such time will be allowed as would enable him, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business. He must, moreover, proceed to remove the goods with diligence after he is informed of their arrival, and must provide himself with ample means for doing so. In *Hedges v. Railroad Co.* [49 N. W. 223], goods arrived for the plaintiffs early in the morning. They received notice of the fact an hour or two later on the same day, and gave directions to their carman to go for and bring them from the depot. The carman brought away one load, but during the balance of the day carted for the plaintiffs to other places or remained idle. No other directions were given, and no further effort was made to remove the goods. During the following night the goods were burned without the fault of

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the defendant. It was held that the loss must be borne by the plaintiffs, the defendant's relation to the goods having become changed before they were burned by the delay of the plaintiffs in removing them. 'The plaintiffs seek to hold the defendant,' say the court, 'to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs in turn be held to prompt and diligent action. A consignee cannot, after he has notice of the arrival for him of property, defer taking it away while he tends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much time as the consignee, after notice, gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, cannot be allowed to him in estimating what is a reasonable time for him, in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier. He may attend first to whatsoever demand of his business he deems the most urgent or the most profitable, but he cannot do this at the hazard and expense of the carrier. It is the duty of the carrier to give notice of arrival. It is the duty of the consignee, at once and with diligence, to act upon this notice, and to seek delivery, and to continue until delivery is complete. Either may neglect this, his duty, but then the consequence of the neglect must be borne by him.' "

This was not a large consignment of goods. Part of them arrived on Friday, and part on Saturday. The agent of plaintiff seems to have preferred to leave the goods where he did until it suited his convenience to remove them, instead of acting promptly. He had receipted for them, and himself placed them under lock and key. He had an abundance of time to remove them, but did not do so. Under the proofs, the circuit judge should have directed a verdict, as to these goods, in favor of defendant. See *Hasse et al. v. Express Co.*, 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; *Moses v. Railroad*, 32 N. H., at page 541, 64 Am. Dec. 381.

The other branch of the case is more difficult. Mr. Bogue was in the habit of gathering up empty bottles from plaintiff's customers, and sending them back to Detroit in shipping cases. The bottles and cases in controversy had been deposited by him on one of the outside platforms of the freighthouse preparatory to their shipment to Detroit. It was the claim of plaintiff that these goods were ready for shipment and that the agent of defendant had been notified to ship them as soon as the company was ready. It was the claim of defendant that plaintiff was in the habit of bringing the bottles and cases to the platform and sorting them there—

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sometimes leaving them there for days, until he got them ready for shipment—and that when they were ready he notified the agent, and a bill of lading was made out for them, but that upon this occasion defendant had no notice the goods were ready for shipment, and that they were not in its possession as a common carrier. This raised a question of fact for the jury, under proper instructions. In *Hutchinson on Carriers* (2d Ed.) § 94, it is said: "The entire responsibility for the safety of the goods being shifted from the owner to the common carrier as soon as the delivery is made, it frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time such delivery becomes complete; for, as we have seen, until the entire and exclusive custody of them has been given to the carrier, no responsibility rests upon him in that character. The most that can be said generally upon this subject is that, a tender of the goods being made to the carrier, his liability for their safety as carrier arises eo instanti with his acceptance of them. * * * To effect a delivery to the carrier, there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment had been accomplished; and, until this had been done, it cannot be said that the carrier has assumed any responsibility for them as carrier." See, also, *Id.* § 96; *Meloche v. Railroad Co.*, 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas., N. S., 82. If in this case Mr. Bogue had done all he intended to do to the goods before the goods were shipped, and had notified the agent of the defendant they were ready for immediate shipment, and the agent agreed to forward them, that would be sufficient to make the company liable as a common carrier. 5 Am. & Eng. Ency. of Law (2d Ed.) 180. If this had not been done, it would not have been so liable.

Judgment is reversed and a new trial ordered. The other Justices concurred.

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(*Supreme Court of Illinois, June 16, 1903.*)

[67 N. E. Rep. 804.]

Injuries to Live Stock in Transit—Measure of Damages.

In an action against a railroad for injury to horses shipped over its lines, the measure of damages was the difference between the market value of the horses at the time they were shipped and their market value on arrival at their destination in their then condition. What they sold for a month after their arrival was immaterial.

Same—Same—Evidence.

In an action for injury to horses shipped over defendant railroad, evidence of plaintiff as to market value of his horses at their destination was competent, where he was shown to have had a large experience in

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selling horses, and remained at the point of their destination for some days, and posted himself on the market there, although he had never before sold any horse at that place.

Instructions.

A party cannot object to a modification of an instruction requested by him, where the clause added was similar in effect to clauses in instructions given on his own behalf.

Carriage of Live Stock—Assent to Contract—Burden of Proof.*

The burden is on a railroad to show that the terms of a contract of carriage, relied on in defense to an action for injury to live stock, were assented to by the consignor.

Appeal from Appellate Court, Third District.

Action by W. R. Patton against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff (104 Ill. App. 550), defendant appeals. Affirmed.

Geo. F. McNulty, for appellant.

Charles C. Lee and Craig & Kinzel, for appellee.

WILKIN, J. This is an action on the case by W. R. Patton, in the circuit court of Coles county, against appellant, to recover damages for alleged injuries to 19 horses which he had shipped over its road from Charleston, Ill., to Buffalo, N. Y. The declaration alleges that by reason of the negligence of the defendant some of the horses died, and the others were injured and lessened in value to the amount of \$1,500, and that plaintiff was put to an expense of \$400 in caring for them. General issue was pleaded, and a trial had, resulting in a verdict and judgment for the plaintiff of \$1,200. Motion for new trial was denied, and judgment entered on the verdict. The defendant prosecuted an appeal to the Appellate Court for the Third District, where the judgment below was affirmed. The case is brought here upon further appeal; the appellant urging a reversal upon the grounds that the court erred in the admission and exclusion of evidence and in the giving and refusal of instructions.

The horses were shipped on February 21, 1901, and arrived at Buffalo three days later. They were shipped in what is known as an "Arms Palace Car," equipped with separate stalls for each horse. Owing to the rough handling of the car some of the horses were bruised and injured, and when the

*See monograph appended to *Hengstler v. Flint & P. M. R. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 707; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 7 R. R. R. 852, 30 Am. & Eng. R. Cas., N. S., 852 (effect of mere receipt of bill of lading on prior contract); *Chicago & N. W. Ry. Co. v. Calumet Stock Farm* (Ill.), 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162; *San Antonio & A. P. Ry. Co. v. Barnett* (Tex.), 1 R. R. R. 789, 24 Am. & Eng. R. Cas., N. S., 789; *Dunbar v. Charleston & W. C. Ry. Co.* (S. Car.), 1 R. R. R. 761; 24 Am. & Eng. R. Cas., N. S., 761; *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. R. Cas., N. S., 668 (shipping receipt as a contract); *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782; *Merrill v. Pacific Transfer Co.* (Cal.), 21 Am. & Eng. R. Cas., N. S., 143.

car arrived at Indianapolis it was found that one of the horses was dead. They were unloaded at Indianapolis, and two of them were sold. The remainder were then reloaded. Before arriving at Buffalo they encountered extremely coal weather, which caused some of them to contract severe colds. Upon their arrival they were unfit to be placed on the market, and appellee took charge of them for over a month, incurring considerable outlay for medicines, treatment, etc.

Upon the hearing, when appellee was being cross-examined, he was asked what the 16 horses sold for after he had prepared them for market. His counsel objected to the question on the ground that it was immaterial, which objection was sustained. The court committed no error in sustaining the objection. The measure of damages was the difference in value between what the horses were worth upon their arrival at Buffalo in the condition they were then in and when they were received by the railway company at Charleston. *New York, Lake Erie & Western Railway Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *Estill v. New York, L. E. & W. Ry. Co. (C. C.)* 41 Fed. 849. Appellee may have received, on the sale of the horses a month later than their arrival, more or less than their market value at the time they reached their destination. The evidence sought to be introduced was therefore immaterial, as tending to show what they would have sold for if they had arrived in marketable condition, and was properly excluded.

It is next insisted that the trial court erred in allowing the appellee to testify as to the market value of his horses at Buffalo; it being insisted that the evidence fails to show such a knowledge on his part of the value of horses in that market as to qualify him to testify. It appears that he had had a large experience in handling and selling horses. While he had never before sold any in the city of Buffalo, on this occasion he remained there several days, and, as he says, posted himself on the markets there. The value of the horses on the market at Buffalo was a matter about which several other witnesses testified whose competency is not questioned; and, even if appellee had only a limited knowledge of the market there, his evidence was competent, its weight being a question for the jury. *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68.

Upon the hearing, appellant requested the court to instruct the jury that if they believed, from the evidence, that plaintiff shipped a car load of horses over defendant's line, and at that time entered into the contract introduced in evidence, and signed the same voluntarily and individually, then the contract is binding on plaintiff, and must be so treated by the jury. The contract referred to by this instruction was the bill of lading introduced in evidence, which contained clauses limiting the liability of the railway company. The court re-

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refused to give the instruction as asked, but modified it by adding: "Unless you believe, from the evidence, that by reason of some fraud or artifice on the part of the defendant or its agent the plaintiff was misled as to the contents of such contract." It is contended by counsel for appellant that there was no evidence before the jury tending to show that any fraud or artifice had been practiced on the part of the railway company, or that the plaintiff was misled as to the contents of the contract, and that therefore this instruction, and other instructions containing a similar modification, were erroneously given to the jury. An examination of the instructions given on behalf of the railway company, however, shows that one of them, at least, expressly contains the clause incorporated in the modification objected to. It is well settled that one cannot complain of instructions given for his opponent which are similar in effect to his own. *City of Beardstown v. Smith*, 150 Ill. 169, 37 N. E. 211; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912. Independently of other considerations, there was, therefore, no reversible error in the modification of the instructions in question.

It is finally insisted that the court erred in refusing to instruct the jury, at the request of the defendant, that there was no evidence in the case tending to show that if the plaintiff did not know the terms of the shipping contract offered in evidence by the defendant, or that it was a contract, such ignorance of the plaintiff was caused by any fraud or artifice of the defendant or its agent. Even if it could be said there was absolutely no evidence of fraud or artifice on the part of defendant or its agent, the burthen is on the carrier to show that the terms of the contract were assented to by the consignor, and in the absence of any evidence the presumption follows that he did not assent to the terms of the contract. The instruction was therefore properly refused. *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, *supra*.

From a careful examination of the whole record we are satisfied the trial court committed no error. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

KLUGHERZ v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, June 19, 1903.)

[95 N. W. Rep. 586.]

Injury to Person at Station—Degree of Care.*

A railroad company was unloading a gravel train standing upon a track which formed a curve adjacent to its depot grounds. The un-

*As to the care due persons, other than passengers, at stations and depots on business, see *Holcombe v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 482, 31 Am. & Eng. R. Cas., N. S., 482 (same degree of care as that

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loading was done by means of a plow at one end of the train, propelled by a locomotive at the other, connected by a steel cable which was kept over the cars by means of pulleys and stay ropes fastened to the sides of the cars on the outer line of the circle. While in operation, one of the stay ropes broke, releasing the cable, which struck respondent, who was standing near the depot, causing injury: *held*:

If respondent was upon the premises in good faith, in pursuance of the purpose of meeting for business consultation a person whom he had reason to believe was to take a train, the company owed him the duty of ordinary care in conducting the unloading operations.

Same—Duty to Licensee.

It was error to instruct the jury that, if respondent was upon the premises for a lawful purpose at the time claimed, appellant owed him the duty of ordinary care.

Evidence.

It was not error to receive evidence as to the manner of starting the engine, and in regard to the character of the rope for such use.

(Syllabus by the Court.)

Appeal from District Court, Blue Earth County; Lorin Cray, Judge.

Action by Henry Klugherz against the Chicago, Milwaukee & St. Paul Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

H. H. Field and Pfau & Pfau, for appellant.

Young & Lossow, for respondent.

LEWIS, J. Appellant company was engaged in filling a hole in the northerly side of its depot in the city of Mankato, and for such purpose had constructed a temporary track upon which it ran a gravel train and unloaded the gravel by means of a plow. The track at this point was upon a curve, and the plow was placed on the northerly end of the gravel train, one end of a long steel wire cable was attached to the plow, and the other end was fastened to a locomotive at the

due passengers) ; monograph appended to Cincinnati, H. & D. R. Co. v. Aller (Ohio), 21 Am. & Eng. R. Cas., N. S., 304 (liability for injuries to persons who are neither passengers nor railway employees, resulting from unsafe station and depot premises) ; Carver v. Minneapolis, etc., R. Co. (Iowa), 7 R. R. R. 70, 30 Am. & Eng. R. Cas., N. S., 70 (mail bag thrown from train) ; Smoak v. Savannah, etc., R. Co. (S. Car.), 7 R. R. R. 240, 30 Am. & Eng. R. Cas., N. S., 240 (persons transacting business at station entitled to same care with respect to platforms, etc., as passengers) ; Illinois Cent. R. Co. v. Hopkins (Ill.), 7 R. R. R. 3, 30 Am. & Eng. R. Cas., N. S., 3 ; Mayne v. Chicago, R. I. & P. Ry. Co. (Okla.), 6 R. R. R. 61, 29 Am. & Eng. R. Cas., N. S., 61 (duty to keep depot premises in safe condition for persons having business at station) ; Hathaway v. New York, N. H. & H. R. Co. (Mass.), 5 R. R. R. 478, 28 Am. & Eng. R. Cas., N. S., 478 (failure to light platform in depot yard) ; Denver & R. G. R. Co. v. Spencer (Colo.), 10 Am. & Eng. R. Cas., N. S., 536 ; McGrath v. Eastern Ry. Co. of Minnesota (Minn.), 13 Am. & Eng. R. Cas., N. S., 768 (bundle thrown from car) ; Clark v. Howard (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 743 (not required to keep depot platform free from ice and snow) ; Norfolk & W. Ry. Co. v. Wood (Va.), 21 Am. & Eng. R. Cas., N. S., 317 (depot platform) ; Atchison, etc., R. Co. v. Whitbeck (Kan.), 7 Am. & Eng. R. Cas., N. S., 778 ; Louisville & N. R. Co. v. Sides (Ala.), 21 Am. & Eng. R. Cas., N. S., 90 ; notes, 19 Am. & Eng. R. Cas., N. S., 496.

southerly end of the train, and because of the curvature of the track it was necessary to fasten the cable over the middle of the cars so that the plow would follow them. The cable was kept in place by means of pulleys some distance apart, fastened with ropes to the side of the cars upon the outer arc of the circle, and the cable passed through these pulleys. A straight line drawn from the plow to the locomotive touched the outhouse and the corner of the depot.

About 4 o'clock in the afternoon, respondent, a boy of 14 years, was standing in the depot grounds at a point about one-third of the distance between the corner of the depot and the outhouse, which was about 20 feet from the depot. The locomotive was started in motion to begin the process of plowing the gravel from the cars, when, at a point nearly opposite the depot, one of the ropes broke, releasing the cable, which, with the action of the engine, violently straightened, struck a corner of the depot and the outhouse, and also respondent, causing him serious injury. Respondent secured a verdict in the court below, and this appeal involves the question whether, under the circumstances, appellant was called upon to exercise ordinary care; also the correctness of certain rulings of the court.

The liability of the company turned upon the nature of the relation existing between it and the respondent at the time of the accident. If respondent was a trespasser upon appellant's property, then it owed him no duty except to refrain from those acts commonly denominated "willful," but there is no claim in this case that any such degree of purpose was manifest. It is claimed that under the great trend of authorities, if respondent was upon the premises as a mere licensee, appellant owed him no greater degree of care than if he had been a trespasser. By a "mere licensee" is meant the tacit permission or privilege which a person has of entering upon the premises of another, but without any invitation, express or implied. Under such circumstances a person enters at his own risk, and, the owner having assumed no responsibility in respect to the conduct or care of such trespasser or licensee, must take the premises in the condition in which he finds them. But where the owner, either expressly or by implication, invites a person to go upon his premises, there arises at once the obligation to use ordinary care to see that the person thus invited shall not be injured. This duty arises from the nature of the contract. It is reasonable for the person invited to assume that the owner will use ordinary prudence to protect him while acting in pursuance of the invitation. No great difficulty has arisen in applying this principle to private parties, but there has been much discussion, and some difference of opinion, with reference to the obligations of public and quasi public corporations as to persons in and around their premises, such as station houses and depot grounds. It is generally claimed by such corporations that

station houses and depot grounds are primarily their properties, to be used for their purposes, and that the public has no rights connected therewith except in the transaction of business with the owners. There has been a difference of opinion as to what constitutes such business. It will not be disputed that the public has the right to enter stations, and, so far as reasonably necessary, depot grounds, for the purpose of taking trains and alighting from them, and making inquiries at the offices of the depot during business hours for the purpose of obtaining information and transacting business with the officers or agents in charge; but some courts have limited to a very narrow compass the time within which a passenger may enter such premises for the purpose of awaiting the arrival of trains. *Pennsylvania R. Co. v. Martin*, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361. Controversy has often arisen where a party injured had, or claimed to have, some business relations directly with the company, and the question at issue was whether, under the circumstances existing at the particular time, the company was under obligations to exercise ordinary care for his protection. It has been held that where a person entered a railroad station in the evening to take a train, and, after finding that the last one had gone, remained there for his own convenience for some time, during which the station master put out the lights at the usual closing time, the company was not liable for injuries to such person received while stepping off the platform in the dark. *Heinlein v. Boston & Providence R. R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676. The decision is based upon the principle that the railroad company had business hours within which it kept the station open and lighted for the benefit of the public, and that its rules and hours for doing business must be complied with. To the same effect, see *Cincinnati, H. & D. R. R. Co. v. Aller* (Ohio) 60 N. E. 205, and *Dowd v. C., M. & St. P. Ry. Co.*, 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917. But that rule does not govern the case before us.

The case now under consideration is also distinguished from those cases where a railroad company has permitted the public to acquire by user certain rights or privileges, as, for instance, a crossing over some part of its grounds or track. Under such circumstances it has been held that the company will be required to exercise the same degree of care as applicable to other streets or crossings. *Davis v. C. & N. W. Ry. Co.*, 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; *Harriman v. Pittsburg, C. & St. L. R. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

It is claimed by respondent that the case is governed by *Ingalls v. Adams Express Company*, 44 Minn. 128, 46 N. W. 325, where it was held that a police officer of Austin, Minn., was entitled to recover for injuries received by the negligent running of an overloaded truck on the platform of the rail-

way company; but in that case the accident occurred at or about the time of the arrival or departure of a train, and the officer was in the exercise of his duty at the time, and had a right to be there. It must be conceded that railroad companies have a right to determine what are reasonable business hours during which the public is permitted to transact business with them, and that they may limit the use of their premises to certain definite periods of time; but we are not prepared to say that, as a matter of law, such companies do not, under any circumstances, owe the duty of ordinary care to persons having occasion to visit a depot for the purpose of meeting some one expected to be there at a certain time, even though neither party has business relations with the company. In this case the young man stated that he went to the station to meet a Mr. Bates on a matter of business; that he expected him to be there about train time for the purpose of boarding the train; but when respondent went to the premises it was about an hour and ten minutes before the time of departure of the train, of which fact he was aware. It may be inferred that he went so early in anticipation of meeting the man there, or in that vicinity, in time to find him and have a consultation before his departure. We are unable to see why the duty of the railroad company to the public should be confined to those having strictly business relations with the company. There is no reasonable distinction between the rights of a person visiting the premises for the purpose of escorting another to a departing train, and the rights of one who goes there for the purpose of talking with a departing person on a business matter. There is a wide difference between the use of the premises with such motives and those of idle curiosity and merely to kill time. While the company cannot be expected to be continuously on its guard as against loiterers and trespassers, yet it is reasonable that it should anticipate that the station house and depot grounds may be used as a place of meeting by people for various lawful purposes at or about the time of the arrival and departure of trains. The dangers connected with the unloading of the gravel train were not apparent to a casual observer who might be in the vicinity—the unloading operations were not conducted upon the premises, although contiguous thereto. The method of fastening the cable by means of pulleys and ropes, and the manner of operating the plow by an engine, were dangerous proceedings. It must have been evident to those in charge of the work that if the stay ropes gave way the cable would instantly sweep across the intervening space between the cars and the depot, and this space was outside of the system of tracks. There has been much discussion in the books, and fine distinctions have been drawn, between active and passive negligence and acts of commission and omission. There is a marked difference between acts of negligence attributed to the condition of the premises, or arising

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from acts committed thereon, and conditions arising outside of the premises. On the one hand, a visitor to the depot grounds may reasonably be expected to assume the condition as he finds it, for it is open to his observation; on the other hand, there may be nothing to put him upon his guard, and it would seem unreasonable to require even a licensee to assume the risk of meeting with such unlooked for occurrences. What the result might be if the respondent was a licensee, it is not now necessary to determine, for we are not prepared to hold, as a matter of law, that he was either a trespasser or a mere licensee. Nor do the facts, taken most favorably for respondent, require, as a matter of law, the conclusion that he was upon the premises by invitation, expressed or implied, and that appellant owed him the duty of ordinary care. It is not possible to lay down a general rule as to the limit of time under all conditions within which a person shall be restricted to visit such premises at his own peril. It is a question of fact, and must be determined according to the circumstances of each particular case. The line should not be too closely drawn, and under the facts and circumstances of this case we think it was a question for the jury to determine whether the respondent was acting in good faith and in the reasonable expectation of meeting a person to be there for a lawful purpose. In determining that question, the time respondent went to the depot in advance of the train time is to be taken into consideration, but the fact that he was there an hour and ten minutes ahead of time is not necessarily decisive. If he was there with such intention, appellant owed him the duty of exercising ordinary care in conducting the unloading operations in the vicinity. Whether it did exercise such care by the use of proper stay ropes, or by keeping a reasonable lookout to guard persons against the danger, were questions for the jury.

The court instructed the jury that if respondent was upon the premises for the lawful purpose of seeing Mr. Bates, whom he supposed was going to take the train an hour or so after the time he went there, appellant owed him the duty of ordinary care; and to the same effect if he was there for a lawful and legitimate purpose, near the time when a train was about to arrive or depart, for the purpose of seeing a person whom he supposed was going away on the train, then the company owed the same duty. This was error, as it took from the jury consideration of the element of time. As above stated, the time he was there should be considered in connection with all the circumstances. For this reason a new trial must be granted.

There was no error in receiving testimony with reference to the circumstances under which respondent went to the depot, and his expectation of meeting Mr. Bates. It was also proper for the court to receive evidence as to how the accident occurred, including the manner in which the engine was

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started. The gist of the act of negligence was the insufficient fastening of the cable, but in determining that question it was competent to consider the manner in which the engine was started. It was also proper to receive evidence in regard to the character of the rope and its suitability for such use. We find no other error in the charge of the court.

Order reversed, and new trial granted.

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(*Supreme Court of Nebraska, Oct. 7, 1903.*)

[96 N. W. Rep. 1014.]

Licenses—Owner of Elevator on Right of Way—Care Required of.

The proprietor of an elevator built upon the right of way of a railroad company by permission of the company is a licensee upon the premises, and must operate his elevator, loading cars therefrom, subject to the right of the company to handle its trains and use the track for switching purposes in the ordinary and usual way of doing such work. **Same—Same—Injury to His Employee—Negligence—Question for Jury.***

The plaintiff, an employee of an elevator, was filling a car with grain when interrupted by the switching operations of a freight train that arrived at the station during his work. The partly filled car was moved easterly along the track, and finally returned to the elevator, and left standing with two other cars attached, and to the west of the partly filled car. The brakeman in charge asked the plaintiff if the car was placed in the right position to be filled, and plaintiff replied that it was not, but was as nearly right as they could place it, and that he would "pinch" it into position with a crowbar. The plaintiff then uncoupled the partly filled car from the one standing west of it, climbed to the top of the car, and loosened the brake. While on the car he looked for the engine, and saw it, with some cars attached, going west on the switch track; the engine then being about to enter upon the main track. Supposing that the crew had finished the work of switching, plaintiff descended from the car, took a crowbar, and went between the partly filled car and the car standing to the west of it, and commenced the work of pinching said car into position to be filled from the elevator spout. While so engaged, another car was shunted or kicked upon the side track with such force as to drive the two cars standing on the track west of the car at which plaintiff was working up against the plaintiff, and driving the crowbar which he was using through his thigh: *held*, that the question of negligence on the part of the company was a question for the jury.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 3. Error to District Court, Fillmore County; Stubbs, Judge.

Action by George B. Giffen against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Deweese and F. E. Bishop, for plaintiff in error.

F. B. Donisthorpe, for defendant in error.

DUFFIE, C. Giffen, the plaintiff below, was employed in an elevator in the town of Grafton, Neb. There are two

*As to the care due persons, other than passengers, at stations and depots on business, see foot-note appended to preceding case.

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elevators on the railroad right of way, Giffen being employed in the west elevator. The facts upon which he claims to recover, omitting the formal allegations, are as follows: "That on or about the 27th day of July, 1901, and for a long time prior thereto, plaintiff had been working in said west elevator at a salary of \$35 per month, and on said day there was standing on said side track at said elevator three cars, one of which plaintiff was loading with grain; the other two standing west of said loaded car, and being empty. That, while said plaintiff was loading said car, one of defendant's engines, pulling several freight cars, proceeded west of said depot on defendant's main line, and backed onto said switch, going to the east elevator for some purpose unknown to plaintiff. That in so going the said three cars as above mentioned were pushed toward said east elevator. That, after the purpose had been accomplished for which defendant's engine and cars had been pushed to said east elevator, the said engine proceeded west, pulling the two empty cars and the car almost loaded as aforesaid back to the west elevator, trying to leave the loaded car in the position it occupied before being moved east. That, after said three cars were so brought to said west elevator, one of defendant's brakemen uncoupled the said three cars from the balance of the freight train, when said freight train proceeded west. That plaintiff, discovering that said loaded car as aforesaid was not occupying a position where the loading of the same could be finished, went to the top of the loaded car—the brake having been put on by one of the defendant's brakemen—and threw off the brake, expecting that by so doing the car would move a little to the east, the grade inclining towards the east. That while plaintiff was still on top of said car he saw that said engine and the cars attached thereto were proceeding west to the main track, and plaintiff, being satisfied that the switching by said engine for said time was through, descended to the ground, and, finding that said loaded car did not move far enough east, took a crowbar and commenced to apply the same to one of the wheels of said loaded car, thereby trying to move the same. That, while plaintiff was so engaged, defendant's brakeman, whose name is unknown to plaintiff, in connection with said freight train, discovered that a loaded car in connection therewith should also have been cut off and left on said side track, accordingly notified the engineer of said train of said fact, and, while plaintiff was engaged in trying to move said loaded car with said crowbar, and without any notice whatever of said change of plans being conveyed to him, without any of defendant's brakemen or agents in any way giving notice to said plaintiff, the said engineer, with gross negligence and extreme carelessness, and without giving any signal, either by whistle, bell, or in any other way, caused said engine to kick said loaded car back on said switch, without said car having any person or persons controlling its move-

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ments, and it was sent with such force that as it struck said two empty cars they struck plaintiff on his back, whereby said crowbar he was using in front of him was driven completely through the following muscles of plaintiff's left thigh, to wit: Gracilis abductor magnus, semimembranous, semitendinosus biceps, and the glutæus magnus." Damage was claimed in the sum of \$3,000. Judgment went in favor of the plaintiff for \$1,000, and the defendant has taken error to this court.

From the foregoing extract from the petition it will be seen that the action is based wholly upon the fact that the plaintiff believed that the train crew in charge of defendant's train had finished the work of switching, and were about to proceed upon their way west. Acting upon this belief, he entered between two of the cars left on the side track, and was injured in the manner stated in the petition by another car of the train being switched upon the side track and kicked against the cars behind him. The right of the plaintiff to recover, and to avoid the charge of contributory negligence, does not depend solely upon his own belief that it was safe to enter between the cars for the purpose of "pinching" one of them into the position desired; but the question is, was this belief derived from acts and declarations of the servants of the plaintiff in error, upon which he might rely, and which, in the judgment of the jury, would justify a reasonably prudent man to act as he did? As stated in *Muldowney v. Ill. Cent. R. Co.*, 36 Iowa, 462: "The reasonable belief of a party that he will not sustain an injury in doing acts which but for such belief would be negligent does not exonerate him from the charge of negligence." The evidence discloses a state of facts which we think made it a question for the jury to say whether or not Giffen was negligent in going between the cars. Prior to doing so, the switching crew had "spotted" the car which Giffen had been filling from the elevator. This, as we understand it, means that the car was placed as nearly in position to be filled from the elevator as could conveniently be done by the use of the engine. At this time the following conversation took place between Giffen and the brakeman in charge: "Q. Tell us what he [the brakeman] said? A. He asked me if the car was at the place I wanted it, and if the car was right. I told him, 'No,' and said that 'it is about as near right as you can get it.' He says, 'Shall I back up?' I said, 'No, I will pinch it with a crowbar.' He says, 'All right,' and went to the other end of the train, and I noticed the train push on out west. Q. Where did you notice it from? A. When I got up on the car I see the train going out, just heading onto the main track." We think that the act of spotting the car, and the inquiry by the brakeman if it was properly placed, indicated that the train crew was through with its work of switching, so far, at least, as not to further interfere with the car which Giffen was filling, and

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that Giffen, by telling the brakeman that he would pinch it into the exact position wanted, with a crowbar, gave notice to the crew that he understood that they would not further interfere with the car, and that he himself would enter between the cars and pinch it into position; thus giving them warning that he was about to occupy the dangerous position that he did under the belief that he was not to be further interfered with in his work, and calling upon them to give him notice if in the further work of switching it was necessary to move the car or to back other cars against it in such manner as to endanger him.

It is true, as argued by the company, that the owner of the elevator and his employees had a right upon the railroad ground at the elevator as licensees only, and that, being mere licensees, they undertook to do their work of loading cars at the elevator subject to the right of the company to handle its trains and use the track for switching purposes; that the company had the first and primary right, as against them, to do all the work necessary in setting in or backing up cars on this side track, whether the cars were moved by the direct movement of the engine, or whether they adopted the mode of kicking such cars onto the side track. This right the company had exercised by moving the car which Giffen was filling from the elevator back and forth upon the side track as the work of switching required; and then, as is usual in such cases, it had attempted to replace the car at the elevator from which it was being filled. In the language of the switching crew, they had "spotted it" and we think that this act, together with what passed between Giffen and the brakeman in charge, was sufficient to support a finding that the company's employees had said to him, in effect: "Our work does not further require us to interfere with this car, and you may safely proceed to pinch it into position, and resume your work of filling it." The employees of the company knew as well as Giffen that the work of pinching the car into position required Giffen to enter between the cars, where he could neither see nor be seen; and, under such circumstances, it was undoubtedly a question for the jury to say whether the company was negligent in not ascertaining that he had entered into his dangerous position, and giving him notice of its intention to further interfere with the car at which he was at work, so that he might protect himself against danger. We conclude, therefore, that there was no error in submitting the question of negligence to the jury, and that the findings of the jury are conclusive.

We recommend an affirmance of the judgment.

ALBERT, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

TERRE HAUTE & L. RY. CO. *v.* SALMON.*(Supreme Court of Indiana, June 19, 1903.)*

[67 N. E. Rep. 918.]

Fencing Tracks—Construction by Adjoining Owners at Railroad's Expense—Statute—Police Power.

Burns' Rev. St. 1901, §§ 5323-5325, require railway companies to fence their tracks where possible, and, on failure to do so, authorize the owner of the adjoining real estate, after 30 days' notice, to build and repair such fences, and collect the expense thereof, together with reasonable attorney's fees: *held*, that such sections were a valid exercise of the police power to provide for public safety.

Same—Same—Attorney's Fees—Due Process of Law.*

The provision authorizing a recovery of reasonable attorney's fees was in the nature of a penalty for failure to comply with the statute, and was not unconstitutional, as depriving the railroad company of its property without due process of law.

Appeal from Circuit Court, Clinton County; James V. Kent, Judge.

Action by James W. Salmon against the Terre Haute & Logansport Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Guenther & Clark, for appellant.

Joseph Combs, for appellee.

MONKS, C. J. This action was brought by appellee against appellant to recover for labor and material in constructing a fence along the right of way of appellant's railroad, where the same abuts on appellee's land, and attorney's fees, under sections 5323-5325, Burns' Rev. St. 1901. Appellee recovered judgment for the value of the fence, and attorney's fees, as provided in said sections. Appellant asks for a reversal of said judgment as to attorney's fees on the ground that the provisions of said sections which authorize the recovery of attorney's fees, in addition to the value of the fence, is in violation of the fourteenth amendment of the Constitution of the United States, and of sections 12 and 22, art. 1, of the Constitution of this state, and therefore void. Said sections, 5323-5325, *supra*, provide that railway companies must fence their tracks where they can be fenced, specifying the kind of fence required, and, upon their neglect or failure to do so, give the owner of real estate adjoining the right of way the right, after giving 30 days' notice of his in-

*As to the constitutionality of statutes making railroad companies liable for attorney's fees, see foot-note appended to *Cleveland, etc., Ry. Co. v. Hamilton* (Ill.), 7 R. R. R. 40, 30 Am. & Eng. R. Cas., N. S., 40; note appended to *Gulf, C. & S. F. R. Co. v. Ellis* (U. S.), 6 Am. & Eng. R. Cas., N. S., 770 (where claims against railroads are not promptly paid); *Atchison, T. & S. F. R. Co. v. Matthews* (U. S.), 14 Am. & Eng. R. Cas., N. S., 89 (where recovery for damages from fire); *Paddock v. Missouri Pac. Ry. Co.* (Mo.), 17 Am. & Eng. R. Cas., N. S., 310 (injuries to live stock in transit, statute unconstitutional).

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tention to do so, to build or repair the same, and collect the expense thereof, including material and labor, together with reasonable attorney's fees. Other sections make railroad companies liable to the owners of stock killed or injured by the locomotive, cars, or other carriages run on such railroad in this state, not securely fenced in, without regard to the question of negligence. Sections 5312-5318, Burns' Rev. St. 1901; *Indianapolis & Cincinnati Railroad Company v. Parker*, 29 Ind. 471. These statutes were passed by the Legislature, in the exercise of the police power, to compel railroad companies to fence their tracks, and are for the protection of persons and property carried upon railroads. It is the undoubted right of the Legislature, in the exercise of the police power, not only to require all railroad companies within the limits of its jurisdiction to inclose their roads with suitable and sufficient fences, as a matter of public safety, but also to impose penalties for failure to perform such duty. Such penalties may be in the shape of double the actual damages suffered, double costs, attorney's fees, and absolute liability in case of injury to animals. Such laws are enacted to compel railroad companies to fence their rights of way, and thus protect persons and property passing on the railroad, and are not in violation of any of the constitutional provisions mentioned by appellant. *Cooley's Constitutional Law*, pp. 712, 713; 2 *Elliott on Railroads*, § 669, and cases cited; 3 *Elliott on Railroads*, §§ 1219, 1220, and cases cited; 12 *Am. & Eng. Ency. of Law*, 1095, 1096, and cases cited; *Thornton on Railroad Fences*, §§ 14, 15, 19; *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Same v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; *Indianapolis & Cincinnati Ry. Co. v. Parker*, 29 Ind. 471; *Same v. McKinney*, 24 Ind. 283; *Same v. Kercheval*, 16 Ind. 84; *Same v. Townsend*, 10 Ind. 38; *Cairo & St. Louis Ry. Co. v. People*, 92 Ill. 170; *Peoria & Decatur Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Johnson v. Chicago & St. Paul Ry. Co.*, 29 Minn. 425, 13 N. W. 673; *Perkins v. St. Louis & Southern Ry. Co.*, 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; *Briggs v. St. Louis, etc., Ry. Co.*, 111 Mo. 168, 172, 173, 20 S. W. 32; *Railroad v. Crider et al.*, 91 Tenn. 489, 19 S. W. 618, and cases cited; *Kansas Pacific Ry. Co. v. Mower*, 16 Kan. 573, and cases cited; *Hopkins v. Kansas Pacific Ry. Co.*, 18 Kan. 462; *Atchison & Nebraska Ry. Co. v. Harper*, 19 Kan. 529; *Missouri River & Gulf Ry. Co. v. Shirley*, 20 Kan. 660, and cases cited; *Jacksonville, etc., Ry. Co. v. Prior*, 34 Fla. 271, 283, 284, 15 South. 760.

It was held by the Supreme Court of the United States in *Minneapolis & Chicago Ry. Co. v. Beckwith*, 129 U. S. 26,

9 Sup. Ct. 207, 32 L. Ed. 585, that section 1289 of the Code of Iowa, which authorized the recovery of "double the value of stock killed or damages done thereto" by a railroad, when the injury took place at a point on the road where it was the duty of the corporation to erect a fence, and it failed to do so, is not in conflict with the fourteenth amendment of the Constitution of the United States, either as depriving the corporation of its property without due process of law, or as denying it the equal protection of the law. The court said (page 31, 129 U. S., page 208, 9 Sup. Ct., 32 L. Ed. 585): "In *The Missouri Pacific Railway Company v. Humes*, 115 U. S. 512, 523, [6 Sup. Ct. 110, 29 L. Ed. 463], a statute of Missouri requiring every railroad corporation within it to erect and maintain fences and cattle guards on the sides of its roads, where the same passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and, if it did not, making it liable in double the amount of damages to animals caused thereby, was assailed as in conflict with the fourteenth amendment, on the same grounds urged in the present case, namely, that it deprived the defendant of property without due process of law, so far as it allowed a recovery of damages for stock killed or injured in excess of its value, and also that it denied to the defendant the equal protection of the laws, by imposing upon it a liability for injuries committed which was not imposed upon other persons. But the court said that authority for requiring railroads to erect fences on the sides of their roads, so as to keep horses, cattle, and other animals from going upon them, was found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations; that in few instances could that power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards; that they are absolutely essential to give protection against accidents in thickly settled portions of the country; that the omission to erect and maintain them, in the face of the law, would justly be deemed gross negligence; and that, if injuries to property are committed, something beyond compensatory damages might be awarded in punishment of it. Referring to the rule which prevails of allowing juries to assess exemplary or punitive damages where injuries have resulted from neglect of duties, the court said: 'The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed

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the validity of such legislation. The injury actually received is often actually so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages.' And as to the objection that the statute of Missouri denied to the defendant the equal protection of the laws, the court said that it made no discrimination against any railroad company in its requirement; that each company was subject to the same liabilities, and from each the same security was exacted by the erection of fences, gates, and cattle guards when its road passed through, along or adjoining inclosed or cultivated fields or uninclosed lands; and that there was no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

* * * From these adjudications, it is evident that the fourteenth amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railroad cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction. It may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that by the common law the owner of land was not compelled to inclose it so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway; the common law as to inclosing one's land having been established long before railways were known. But the obligation of the railway company to use reasonable means to keep its tracks clear, so as to insure safety in the movements of its trains, is plainly implied in the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits these means, the omission may be well regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and, if punitive damages in such cases may be given, the Legislature may prescribe the extent to which juries may go in awarding them." In *Perkins v. St. Louis & Southern Ry. Co.*, 103 Mo. 54, 15 S. W. 320, 11 L. R. A. 426, the provision author-

izing the recovery of attorney's fees by the plaintiff in actions for stock killed by reason of the failure of the defendant to fence the railroad track was sustained as a valid exercise of the police power. The court said (page 57, 103 Mo., page 321, 15 S. W., 11 L. R. A. 426): "Our statute giving the owner double damages for stock killed when the railroad is not fenced as required by law has been upheld in several cases on the ground that the law is a police regulation, and designed not only to protect the owner of the stock, but also the traveling public, and that the Legislature may impose a penalty for the violation of the law, and give the penalty to the owner of the stock killed. *Barnett v. Railroad*, 68 Mo. 56, 30 Am. Rep. 773, and cases cited; *Cummings v. Railroad*, 70 Mo. 570; *Spealarn v. Railroad*, 71 Mo. 434; *Humes v. Railroad*, 82 Mo. 221 [52 Am. Rep. 369]. The statute in question is as much a police regulation as is the double-damage section, and the attorney's fee may be lawfully imposed as a penalty for the violation of the law. It is a penalty allowed in all cases of a class, and the objection that the law is special legislation is not well taken." In *Briggs v. St. Louis, etc., Ry. Co.*, 111 Mo. 168, 20 S. W. 32, the court cited with approval the case of *Perkins v. St. Louis & Southern Ry. Co.*, supra, and said: "The attorney fee allowed is in the nature of a penalty, or as exemplary damages, imposed as a punishment for the negligent and willful disregard of the requirements of the statute. Upon these grounds alone its constitutionality has been upheld. *Railroads v. Humes*, 115 U. S. 522 [6 Sup. Ct. 110, 29 L. Ed. 463]; *Perkins v. St. Louis & Southern Ry. Co.*, 103 Mo. 52 [15 S. W. 320, 11 L. R. A. 426]." In *Gulf, etc., Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 225, 41 L. Ed. 666, an action was brought to recover for a colt killed by the railway company, and attorney's fees, as provided by a statute of the state of Texas. There was no statute in that state making it the duty of railroads to fence their tracks, and the court held that said statute was in violation of the equality clause of the fourteenth amendment of the Constitution of the United States. The court said: "But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that

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they fence their tracks, and, as a penalty for a failure to fence, double damages, in case of loss, are inflicted. *Missouri Pacific Railway v. Humes*, 115 U. S. 512 [6 Sup. Ct. 110, 29 L. Ed. 463]. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the Legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to the party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The Legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory. It is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the state." The court in the *Ellis Case*, *supra*, expressly recognized and affirmed the rule declared in the authorities heretofore cited. The attorney's fee in an action to recover for the value of the fence constructed by the adjoining landowner is in the nature of a penalty or damages imposed by the Legislature as a punishment for the negligent and willful failure of the railroad company to erect said fences as required by the statute, and to compel them to construct the same. It is clear, therefore, that, under the rules declared in the cases cited, the clause in regard to attorney's fees is not in violation of the fourteenth amendment of the Constitution of the United States, or any provision of the Constitution of this state. See, also, *Farmers', etc., Ins. Co. v. Dobney* (No. 189, decided April 6, 1903) 23 Sup. Ct. 565, 47 L. Ed. —; *Id.*, 62 Neb. 213, 86 N. W. 1070; *Union, etc., Co. v. Chowning*, 86 Tex. 654, 26 S. W. 943, 24 L. R. A. 504; *Atchison, etc., R. Co. v. Matthews*, 58 Kans. 447, 450, 49 Pac. 602. There may be a few states where the courts hold otherwise, but the weight of authority clearly sustains the views expressed in this opinion. *Elliott on Railroads*, § 1220.

Judgment affirmed.

PITTSBURG, C., C. & ST. L. RY. CO. v. ROBSON.

(Supreme Court of Illinois, Oct. 26, 1903.)

[68 N. E. Rep. 468.]

Accident at Crossing—Negligence—Contributory Negligence—Sufficiency of Evidence.

In an action against a railroad company for personal injuries

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received in an accident at a railroad crossing, evidence considered, and *held* sufficient to support a finding that defendant was guilty of negligence, and that plaintiff was in the exercise of due care.

Allowing Steam to Escape near Crossing—Reasonableness of Statute.

Rev. Code Chicago, art. 2, § 1736, providing that no railroad company shall cause or allow the cylinder cock, safety valve, or other valves of any locomotive to be opened so as to permit steam to escape at any time while running along any railroad track, or where the engine is within 100 feet of any street or crossing, provided that when such engine shall be standing, and for six revolutions of the driving wheel after being put in motion, the cocks may be opened for the purpose of allowing condensed steam to escape, is not void as unreasonable.

Same—Whether Locus in Quo. a Street—Question for Jury.

Rev. Code Chicago, art. 2, § 1736, provides that no railroad company shall allow the cylinder cock, safety valve, or other valves of any locomotive to be opened so as to permit steam to escape where the engine is within 100 feet of any street crossing. In an action for personal injuries, in which plaintiff claimed that defendant railroad company was negligent, under the ordinance, in allowing steam to escape near a street crossing, it appeared that a portion of the street was within the limits of stockyards, and that people were not allowed to travel thereon without permit of the authorities of the stockyards, but that stock, as well as people, were constantly passing on the street from it, and that the street was used by all the employees of the stockyards and those who frequented the stockyards on business: *held*, that the question of whether or not it was a street, within the meaning of the ordinance, is one of fact for the jury.

Same—Negligence—Question for Jury.

In an action against a railroad company for personal injuries alleged to have been caused by defendant's negligence in running its train across a street crossing on which plaintiff was leading a number of horses, plaintiff claimed that defendant was also negligent in allowing steam to escape in violation of Rev. Code Chicago, art. 2, § 1736, prohibiting railroad companies from allowing steam to escape while a locomotive is within 100 feet of any street crossing, etc.: *held*, that a requested instruction stating that the escape of steam was not wrongful was properly refused, that question being one for the jury.

Same—Customary Noises—Absence of Negligence—Instruction.

In an action against a railroad company for personal injuries alleged to have been caused by defendant's negligence in running its train across a crossing where plaintiff was engaged in leading a number of horses, an instruction that defendant had the right to run its engine and train at the time and place in question, and thereby to create such noise, smoke, and steam as were usual and customary, was properly refused, as invading the province of the jury.

Negligence—Several Counts In Declaration—Right to Recover—Instruction.

Where, in an action for personal injuries, each one of the three counts in the declaration stated a cause of action, an instruction permitting a recovery under any one of the counts was not objectionable.

Pleading.

By pleading to the declaration, defendant waives any objection thereto, unless it is so defective that it will not sustain the judgment.

Personal Injuries—Ground for New Trial.

In an action for personal injuries, the fact that plaintiff failed to procure the presence as a witness of a physician who treated him for his injuries did not entitle defendant to a new trial; it appearing that the plaintiff's counsel made all reasonable effort to procure the witness.

Appeal from Appellate Court, First District.

Action by Joseph Robson against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judg-

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ment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, begun in the superior court of Cook county on April 27, 1900, by the appellee against the appellant company to recover damages for a personal injury. The Union Stockyards & Transit Company and the Chicago Junction Railway Company appear to have been codefendants below with the appellant, but the suit was dismissed against them, and allowed to stand as against the appellant. The trial resulted in verdict and judgment in favor of the appellee, which judgment, upon appeal to the Appellate Court, has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The declaration consisted of three counts—one original count and two additional counts. The original count alleges that on March 2, 1900, upon certain railroad tracks crossing Laurel street, a much-used thoroughfare at the stockyards in Chicago, appellant was operating a switch engine, with certain cars attached; that appellee, who was employed in unloading and yarding stock at the stockyards, with certain other men, was leading horses in a bunch, fastened together in fours—one man having charge each of four horses—northward on Laurel street toward and across the said railroad tracks; that when a part of the horses had crossed the tracks to the north, and as plaintiff, with other men, was leading the other horses toward and near the tracks, the appellant, through its servants, approached the crossing with a switch engine; that the flagman stationed there signaled the engine to stop, so as to permit appellee and the other men to get the horses over the crossing; that, by reason of the large number of horses—there being about 36—and of the manner in which they were being led across the tracks, it was appellant's duty to stop the engine until the horses had passed, but that it recklessly, carelessly, and improperly ran the engine through the middle of said bunch of horses, leaving some on the north and some on the south side of the track; that, as the engine reached the crossing, its steam commenced to blow off, causing great noise, which so frightened the horses that they ran away, and appellee, while attempting to hold them, and while in the exercise of ordinary care for his own safety, was thrown to the ground and kicked and trampled upon by the horses, and thereby permanently injured, etc.

The first additional count of the declaration alleges that on March 2, 1900, the Union Stockyards & Transit Company operated a railroad at the stockyards, within the limits of the city of Chicago, and appellant, with the consent of said company, operated a certain engine and cars upon the railroad, which crossed a thoroughfare known as Laurel street; that section 1736 of article 2 of an ordinance entitled "Steam Railways," of the Revised Code of Chicago, which was then and

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there in full force, provided that "no railroad company or person in charge of any locomotive engine shall cause or allow the cylinder cock or cocks, safety valve or other valves of any locomotive engine, to be opened so as to permit steam to escape therefrom at any time while running upon or along any railroad track, or where the engine is within one hundred feet of any street or railroad crossing or viaduct; provided, however, that, when such engine shall be standing at such point in said city, and for six revolutions of the driving wheel after being put in motion, the said cocks may be opened for the purpose of allowing condensed steam to escape"; that appellee was employed by the Chicago Junction Railway Company in unloading and yarding stock at said yards, and earned \$55 per month, and while he, with other men, was leading a large number of horses, attached together in fours, along Laurel street, towards and with the intention of crossing the railroad tracks, and while some of the men leading the horses were in the act of crossing the tracks, and as appellee, leading four horses, was approaching and close to the tracks, exercising ordinary care for his own safety, the appellant ran its locomotive engine along said track up to and across Laurel street, and, while doing so, wrongfully and unlawfully caused and allowed the safety valve of the engine to become open, and the steam to escape therefrom in large volume and with great noise, and, as a direct result thereof, the horses led by appellee broke away, throwing appellee down, and he was thereby kicked, dragged, and trampled upon, and his back and spine seriously injured, etc.

The second additional count avers appellee's employment as above stated, and that while he at the time in question, in the discharge of his duty, together with other men, was leading a large number of horses, attached together in fours, along Laurel street, for the purpose of crossing said railroad tracks, and as certain of the men were in the act of crossing the tracks, and as he, leading four horses, was approaching close to the tracks, in the exercise of ordinary care for his safety, the appellant, through its servants, so recklessly, negligently, and carelessly ran said locomotive engine upon and over the crossing, through said bunch of horses, leaving some upon one side of the track and some upon the other, and permitted the steam of the engine then and there to escape in such large volume and with such great noise, that, as a direct result thereof, the four horses which appellee was leading were frightened and ran away, and the plaintiff was thereafter injured and damaged, etc.

Geo. Willard, for appellant.

James C. McShane, for appellee.

MAGRUDER, J. (after stating the facts). Upon the conclusion of all the evidence upon the trial below, the appellant asked a written instruction instructing the jury, "as a

matter of law, that, the pleadings and all the evidence considered, the plaintiff is not entitled to recover in this action. You will therefore return a verdict finding the defendant not guilty." The court refused to give this instruction, and such refusal is complained of by the appellant as error. It was not error to refuse the instruction, if there was evidence tending to sustain the cause of action. In order to determine whether there was evidence sustaining the cause of action, it is necessary to refer briefly to the material facts. In order to entitle the appellee to recover, it was necessary to show that he was in the exercise of ordinary care for his own safety, and that the appellant was guilty of such negligence as caused the injury.

1. Was the appellant guilty of such negligence as caused the injury? Laurel street was a narrow street, not more than 25 or 30 feet wide, running north and south within the limits of what are called the stockyards. North and beyond the limits of the stockyards, and south and beyond the limits of the stockyards, the street is known as Morgan street, as we understand the evidence. Persons were not allowed to travel upon so much of Laurel street as was within the limits of the stockyards without a permit from the authorities of the stockyards company. But stock, consisting of horses and cattle and teams, as well as people, were constantly passing up and down Laurel street across the tracks every day. Just before appellee was injured, an engine pushing some 12 or 15 empty refrigerator cars approached Laurel street on the middle of the four or five tracks which cross it at that point, coming from the west and going towards the east. About the same time nine men, including appellee, were coming from the south on Laurel street, and approaching the tracks towards the north, leading about thirty-six horses in bunches each of four horses. Appellee was leading four of the horses, and was leading the third bunch from the end of the nine bunches. In other words, there were six bunches, of four horses each, north of appellee, and two bunches, of four horses each, south of him. The horses were heavy draft horses, and were tied from halter to halter, with their heads close together. As we understand the evidence, appellee was leading four of these horses by the halter which tied their heads together. The evidence shows that this was the customary way of leading the horses. At this time the men leading the horses were taking them from the stables of the company to certain chutes along the railway tracks for the purpose of shipping the horses. Laurel street was a planked street. There was a flagman stationed at the point where the railroad tracks crossed Laurel street, in the employ of the stockyards company, and in charge of the crossing, and whose duty it was to regulate the trains on the tracks and the traffic on the street. As the train, pushed by the engine at the west end of it, approached Laurel street, the flagman signaled it to stop, and it

did so; but, before the horses had all passed over the crossing, the train crew, or engineer, or whoever was in charge of the engine and the cars, started across Laurel street, and refused to stop, although cautioned to do so by the flagman. All the horses, except twelve, or three bunches thereof, succeeded in crossing the tracks, some of them at the rear narrowly escaping injury from the train. Twelve of the horses, four of which at the head were lead by appellee, did not succeed in getting across, and, while the engine was upon the crossing, or very near thereto, the engine blew off steam from the safety valve, making a very loud noise, which frightened all three bunches of horses, so that they ran away. The horses led by appellee, in breaking loose, knocked him down and ran over and trampled upon him.

There was evidence tending to show that the appellant company was guilty of negligence, because its train crew ran over the crossing at the time and place in question before all the horses had passed over, and in disregard of the flagman's signal and command. The flagman says that he was at the crossing at the time; that his business there was to flag the crossing, and see that stock went across carefully, and that no accident happened; that teams or horses or cattle or people passed over there every second, probably; that the Pan-handle men backed their train east; that the engine was a switch engine; that the cars were east of the engine, about 12, 13, or 16 of them; that they stopped probably 150 feet west of the crossing when he flagged them to stop. The flagman says that there were one or two men on tops of the cars, and he also says: "He started up again, and I tried to stop him. He says, 'I won't stop.' I said, 'You better stop.' * * * They shoved all the cars and engine over the crossing, and when the engine got on the crossing it blowed off steam pretty strong. * * * They made a pretty loud noise." And he says the steam came from the safety valve.

Another witness says that there were two trainmen on top of the cars, and that his attention was directed to the remark of the flagman, who shook his flag, and said: "The next time I tell you to stop, you'll stop." Still another witness, who was leading some of the horses, says: "I just got across the tracks. I seen the train backing down, and the flagman was trying to stop the train, so that we could get across. I just got across, and the others were cut off. When he was trying to stop them, I was just about on the crossing." The same witness also says, speaking of the flagman: "He motioned for him to stop, and he wouldn't stop. When they came along, they were exhausting steam, and it would scare any horse in the city of Chicago, if they were forty rods away from them—it made that loud a noise."

There was also evidence, tending to show negligence on the part of the appellant company, or its servants, in permit-

ting the steam to escape from the safety valve in violation of the city ordinance set forth in the declaration, and introduced in evidence, and set out in the statement preceding this opinion.

In the second place, in order to entitle the appellee to recover, it was necessary to show that he was in the exercise of due care for his own safety. Upon this point the evidence is substantially undisputed. When appellee had approached from the south within some twenty or thirty feet of the southernmost track, he was signaled to by the flagman to stop, and he did stop. We discover nothing in the evidence to indicate that he was guilty of any want of due care for his own safety. As is well said by the Appellate Court in their opinion: "There is no contention but that the plaintiff is shown by the evidence to have been in the exercise of ordinary care for his own safety prior to and at the time of the injury, nor * * * is there any argument or statement as to any deficiency in the proof bearing on the negligence alleged in the declaration. * * * The pushing of the train over the street crossing, in direct violation of the flagman's signal, while the steam was escaping, with a loud noise, as the evidence clearly tends to show, was the proximate cause of plaintiff's injury." In view of what has been said in regard to what the evidence tends to prove, we are of the opinion that the trial court committed no error in refusing to instruct the jury to find for the appellant.

2. Appellant's objection to the admission of evidence, and its criticism upon the first refused instruction asked by the appellant, involve the same point, which relates to the ordinance in question. It is claimed that the court erred in admitting the ordinance, and in refusing the first instruction, which told the jury that the ordinance was applicable to public highways, but not to private roadways or passageways, such as Laurel street, so called, where the accident took place.

It is said that the ordinance in question was unreasonable, and therefore void. The ordinance, as we understand the position of counsel, is said to be unreasonable upon the alleged ground that it was necessary to open the valves and allow the steam to escape in order to prevent an explosion, and that the ordinance cannot be otherwise construed than as prohibiting absolutely the escape of steam from the safety valves at the times and places specified in the ordinance. We do not think that the ordinance is capable of any such construction. The safety valve was provided in case of emergency, and the steam can be prevented from escaping by opening the fire box, thereby reducing the heat in the fire box, if the steam is found to be getting too high. The ordinance authorizes the opening of the cylinder cocks when the engine is started, and while making a given number of revolutions. The fireman can regulate the pressure of steam by the character of fire he keeps in the fire box, but if, for any

reason, the pressure runs up, he can reduce it or regulate it by opening the fire-box door. The evidence tends to show that there was no necessity, upon the occasion in question, for the engine to carry such high pressure, as the train crew were not moving more than half a train load of cars, and were moving slowly on a level track. The evidence of the engineer tends to show that they did not usually allow the steam to "pop off," and there would seem to have been no good reason why it was permitted to "pop off" upon the occasion in question. It is highly dangerous in cities to permit engines to blow off steam in this manner, and the common council had an undoubted right, in the exercise of its police powers, to pass an ordinance forbidding it. When the pressure of the steam can be so easily regulated, and its escape avoided, the ordinance forbidding its escape cannot be said to be unreasonable. It is only "an extreme case of oppression or outrage that would justify" the court in holding an ordinance unreasonable. *Chicago & Northwestern Railway Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. 574. It must be made clearly to appear that it is unreasonable, before the court can so declare. *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037. In *Illinois Central Railroad Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724, it was held that an ordinance requiring the ringing of a bell on an engine running within the limits of a city would not be an unreasonable requirement.

The ordinance does not use the words "public street," but the word "street." While Laurel street may not have been a public street in the sense in which a street in a city, used by all the inhabitants thereof, is called a "public street," it was yet used by all the employees of the stockyards company, and those who frequented the stockyards upon business. Although it may have been in a certain sense a private street, the traffic on it was so great that it was necessary to maintain a flagman at the crossing in question. Whether or not it was a public street in such a sense as to make the ordinance applicable to it, was a question of fact largely for the jury. *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Callaghan*, 157 Ill. 406, 41 N. E. 909; *Chicago & Alton Railroad Co. v. O'Neil*, 172 Ill. 527, 50 N. E. 216. The ordinance was designed for the protection of life and property, and was as necessary at the street in question, whether public or private, as it was at any other street or crossing having the same amount of traffic.

In addition to what has been said in regard to the ordinance, it is to be noted that the prohibition of the ordinance is against permitting "steam to escape therefrom at any time while running upon or along any railroad track" within the city of Chicago. In the present case the cars, which were being pushed eastward by the engine in question, and the engine itself, were certainly upon a railroad track. By the terms of the ordinance, steam may be allowed to escape while

the engine is "standing, and for six revolutions of the driving wheel after being put in motion." For the reasons above stated, we are of the opinion that the ordinance is not an unreasonable one.

It is also urged that the court below erred in refusing to give the second instruction asked by appellant. We do not think that there was any error in this regard, for the reason that the instruction ignores any violation of the ordinance in question, and expressly states that the issuance of steam from the valve under the circumstances disclosed by the evidence was not wrongful, whereas the question should have been left to the jury. The instruction also states that appellant had the right to run its engine and train at the time and place in question, and thereby to create such noise, smoke, and steam as were usual and customary. The evidence tended to show that it did not have the right to run its engine and train across this crossing at the time in question, in view of the large number of horses then passing over it, and in view of the flagman's express warning not to do so. Even if it did have such right, it does not follow that it had the right to create such noise, smoke, and steam as are usual and customary, for the condition that confronted appellant here was not a usual or customary condition. At any rate, it was a question for the jury to determine whether appellant was or was not negligent in running the train across this crossing at that time under the circumstances.

Complaint is also made that the court modified the third instruction asked by the appellant, and gave it as so modified. We concur with what is said upon this subject by the Appellate Court in their opinion, when they say: "The instruction as modified and given by the court, we think, was more favorable to the appellant than it was entitled to; and the modified instruction does not as is contended by appellant, leave the jury to put their own construction upon the ordinance, but only to say whether the evidence was sufficient to show that it was violated."

It is also contended by the appellant, that an instruction given by the court of its own motion was erroneous, upon the alleged ground that it limits appellee's care to the precise time and place of the accident. This objection is not well taken, for the reasons set forth in the following cases: *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Lake Shore & Michigan Southern Railway Co. v. Ouska*, 151 Ill. 232, 37 N. E. 897; *Lake Shore & Michigan Southern Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510.

Appellant complains of the first instruction given by the trial court for the appellee, upon the ground that it permits a recovery under either one of the three counts in the declaration. We see no reason why each count of the declaration does not state a cause of action, and hence the instruction was unobjectionable on this ground. The count setting up

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the ordinance of the city hereinbefore referred to is objected to for the reasons urged against the validity of the ordinance, as above stated. But as we hold the ordinance valid, we do not regard the count as defective for this reason. The evidence tended to sustain each count, and appellant failed to demur to the declaration, but filed the general issue. "By thus pleading it waived any objection to the declaration, unless the declaration is so defective that it will not sustain the judgment." *Himrod Coal Co. v. Clark*, 197 Ill. 514, 64 N. E. 282. The declaration here cannot be said to be so defective as not to sustain the judgment.

3. The trial court is said to have erred in refusing to grant a new trial. This contention is based upon certain matters set forth in an affidavit filed in favor of the motion for new trial. This affidavit has reference to the alleged failure of the appellee to procure the presence, as a witness at the trial, of a certain physician who treated plaintiff for his injuries. The Appellate Court properly dispose of this objection in the following words: "It appears that plaintiff's counsel made all reasonable effort to procure the presence of the doctor in court before he closed his case; and while, no doubt, his evidence would have had an important bearing upon the extent of plaintiff's injuries, we see no reason why any inference unfavorable to the plaintiff's case should be drawn from the fact that the doctor was not called to testify in his behalf."

After a careful examination of the record, we find no error which would justify us in reversing the judgment of the Appellate Court. Accordingly that judgment is affirmed. Judgment affirmed.

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(*Supreme Court of Iowa, Oct. 22, 1903.*)

[96 N. W. Rep. 965.]

Killing Stock—Locus in Quo—Findings.

Where, in an action for the killing of a horse on defendant's railway track, plaintiff relied on circumstances tending to show that the horse was struck by an engine while on the track, 56 feet north of the center of a highway crossing, while defendant's witnesses testified that the collision occurred on the crossing, the special finding that the horse was not struck on the crossing was equivalent to a finding that it was struck 56 feet north of the center of the crossing.

Same—Evidence—Movements of Horse—Conclusions of Witness.

The testimony of witnesses that certain tracks were of a horse, which tracks indicated his motion—whether walking, running, or jumping—though in the nature of conclusions, was admissible.

Same—Same—Locus in Quo.

Where, in an action for the killing of a horse on defendant's railway tracks, it was important to ascertain the distance of the horse, when struck, from the north cattle guard, and the center of the highway crossing, the testimony of a witness that plaintiff pointed out certain

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depressions scooped in the track, from which he measured, was admissible, as connecting the measurements with the locality of the collision. **Same—Insufficiency of Fence—Rebuttal—Erection of Fence by Plaintiff.**

Plaintiff in an action for the killing of stock on defendant's railway showed the injury to his stock, and want of a sufficient fence at a point where defendant's right to fence existed: *held* not rebutted by evidence that the fence at this point was erected by plaintiff, in the absence of any agreement with plaintiff to erect and maintain such fence, or that the fence was sufficient in its construction, and at the time complained of it was in a fair state of repair.

Same—Failure to Fence.

In an action for the killing of a horse on defendant's track, evidence *held* to show that the collision occurred beyond a highway crossing, and at a place where the company had the right to fence, but failed to do so.

Same—Same—Negligence in Operation of Train Immaterial.

Where, in an action for the killing of a horse on defendant's railway tracks, the jury found that the collision occurred at a place where defendant had a right to fence, but failed to do so, defendant's negligence in operating the train which killed the horse was immaterial.

Appeal from District Court, Appanoose County; Robert Sloan, Judge.

Action for the value of a horse alleged to have been killed by defendant at a point where it had the right to fence, but did not; also through the negligence of its employees. The highway crosses the defendant's right of way at an acute angle. The north cattle guard is 68 feet from the center of the crossing. Trestlework over a ravine forms the south cattle guard, and is 91 feet from the same point. A wing fence extending east intersects the right of way fence, and from such intersection to the highway fence from the corner of the pasture belonged to plaintiff, and over it his horse escaped August 10, 1900, went on the railroad track, and was killed. In the morning of that day it was in the pasture. Later the wires of the fence were found bent and on them hairs of the same color as of the horse. Tracks were traced over the fence up to the embankment from 50 to 60 feet south of the traveled road on the track, and then north to a point 30 feet south of the north cattle guard. To that point the tracks were of a horse walking, and from there they indicated that it was jumping, and the last—9 to 12 feet from the crossing—that its feet had scooped out the earth, as though struck by something. A track was found just outside the rail, immediately west of this, and the body of the horse in the ditch beyond. There was evidence tending to show that defendant failed to blow the whistle at the whistling post, but did blow it three times just as the engine passed over the trestlework, immediately before it struck the horse, at about 9 o'clock a. m., and that the bell did not ring; also that a horse could have been seen on the crossing a quarter of a mile before the engine reached it. The evidence of defendant tended to show that all proper signals were given at the whistling post, and that the horse was not seen until the engine was too near to

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be stopped before striking it; that it was then running toward the track from a distance of 25 or 30 feet, and was struck on the crossing. Trial to jury resulted in a verdict for plaintiff, and a special finding that the horse was not struck on the crossing. From judgment rendered thereon, defendant appeals. Affirmed.

Fee & Fee, for appellant.

C. F. Howell and C. H. Elgin, for appellee.

LADD, J. The highway, where it crosses the railroad, is 45 feet wide. The plaintiff relied on circumstances tending to show that the horse was struck by the engine while on the track 56 feet north of the center of the crossing. The defendant's engineer and fireman testified that the collision occurred on the crossing. The jury rejected their evidence as unreliable, by an answer to a special interrogatory that it did not happen at that place. This was tantamount to a finding that the horse was struck 56 feet north of the center of the crossing, for, under the evidence, the collision must have occurred at one of these two places. Appellant argues that the evidence supporting this conclusion is unreliable, and in any event not inconsistent with the contention that the animal was hit by the engine on the crossing. The probative force of circumstantial evidence requires no vindication at our hands, nor is it necessary to spend any time in demonstrating that the finding of horse tracks leading from a pasture to a point 56 feet from a crossing, and there terminating, and the finding of the body of the horse 12 feet beyond, in the ditch at the side of the track, is inconsistent with the testimony that he was killed by the engine at the crossing. The testimony that the tracks were of a horse, and indicated his motion—whether walking, running, or jumping—was clearly admissible. It was of facts somewhat in the nature of conclusions. These could not well be so described as to convey to the mind of the jury the inference of precisely what the horse was doing, and therefore the witness, as a part of the description, was properly allowed to state whether they were similar to tracks when walking or when running or jumping. "It is competent for a witness to testify to his conclusion, when the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time." *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Bizer v. Bizer*, 110 Iowa, 248, 81 N. W. 465; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770.

2. It was important to ascertain the distance of the horse, when struck, from the north cattle guard and the center of the highway crossing. To enable him to measure such distance, a witness was allowed to testify that plaintiff pointed out certain depressions scooped out in the track, from which he measured. This was admissible as connecting the measure-

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ments with the locality of the collision, for plaintiff's testimony tended to show that the horse must have caused these when struck by the engine. *Ward v. Ry. Co.*, 97 Iowa, 54, 65 N. W. 999.

3. From a point where the east right of way fence intersects the wing fence running north from the trestle to the northwest corner of the pasture, the fence belonged to plaintiff, and was somewhat in the right of way; and as, according to plaintiff's theory, the horse passed directly over this fence in the right of way to the point where it was killed, the defendant insists it is not liable, for that fence was not shown to be defective, and, even if so, the loss was owing to plaintiff's negligence. The character of this fence does not appear, save that it was constructed of posts and wire. No evidence of its sufficiency to turn stock was introduced. If there was any agreement, express or implied, that the landowner should erect the right of way fence or keep it in repair, the record does not disclose it. The mere fact that he had maintained some kind of a fence there for 15 years did not, alone, warrant such an inference. The company had the right to fence its track at the point where the horse escaped. It failed to do so. Upon proof of this, and the injury to the animal by one of its engines passing over the track, a prima facie case was made out for plaintiff. *Code*, § 2055; *Brentner v. C., M. & St. P. R. Co.*, 68 Iowa, 530, 23 N. W. 245, 27 N. W. 605; *Manwell v. B., C. R. & N. R. Co.*, 80 Iowa, 662, 45 N. W. 568; *Wall v. Des Moines, M. & N. R. Co.*, 89 Iowa, 193, 56 N. W. 436; *Norman v. C. & N. W. R. Co.*, 110 Iowa, 283, 81 N. W. 597. If defendant was relieved from the duty of erecting or maintaining a fence by the action of plaintiff, or had other excuse, the burden of proof was upon it both to plead and establish such defense. *Kingsbury v. C., M. & St. P. R. Co.*, 104 Iowa, 63, 73 N. W. 477. As said, the voluntary construction of some kind of a fence by the landowner along the right of way did not excuse the company from erecting that required by law. *Louisville, etc., R. Co. v. White*, 94 Ind. 257; *Norfolk, etc., R. Co. v. McGavock's Adm'rs*, 90 Va. 507, 18 S. E. 909. To relieve the defendant from responsibility, it must not only appear that the fence, in its construction, was sufficient, but at the time complained of it was in a fair state of repair. *Jefferson, etc., R. Co. v. Sullivan*, 38 Ind. 262. If this were shown, the company would not be liable, though the fence may have been erected by a mere volunteer. *Hovorka v. Minneapolis, etc., R. Co.*, 31 Minn. 221, 17 N. W. 376; 2 Thompson, Neg. § 2097. As no agreement with plaintiff to erect or maintain the right of way fence was proven, and a sufficient fence was not shown to have been erected by him as a volunteer, the escape of the horse into the right of way must be held to have been owing to defendant's failure to comply with the statute.

4. Appellant also argues that the collision was not shown to have occurred beyond the east boundary line of the high-

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way; that is, where the company had the right to fence. Waiving the question as to whether this was necessary, we think the evidence is otherwise. The grade at the crossing was about 8 feet high. The approaches to the crossing were 12 feet wide, and the planks 16 feet long. The horse, when hit, must have been 56 feet from the center of these planks, which, in the absence of evidence, will be presumed also to be in the center of the highway. It was the duty of the company to construct this crossing. Code, § 2054; Farley v. C., R. I. & P. R. Co., 42 Iowa, 234. It had been maintained at the identical place for 35 years. In the absence of some controlling reason to the contrary, highways are to be improved so that travel shall pass along the middle line of the land appropriated therefor. Quinton v. Burton, 61 Iowa, 471, 16 N. W. 569. The company cannot well complain of the assumption that it constructed the crossing at the place exacted by law. The statute required the cattle guards and fence to be placed along the line of highway. Andre v. C. & N. W. R. Co., 30 Iowa, 107. These should then have been 22½ feet from the center of the crossing. That the horse was struck beyond a line 22½ feet from the center of the crossing, if not on the crossing, as contended by defendant, the record leaves no doubt. In returning a verdict for plaintiff, and finding that the horse was not hit on the crossing, the jury necessarily so concluded. The collision must have occurred, if the finding of the jury is to be accepted, where the defendant had the right to fence, and failed to do so. This being true, it is immaterial whether the defendant was negligent in the respects alleged, and the errors assigned in relation thereto, if conceded to be such, were without prejudice.

Affirmed.

McGORAN v. NEW YORK, N. H. & H. R. Co.

(*Supreme Court of Rhode Island, Aug. 8, 1903.*)

[55 Atl. Rep. 929.]

Crossing—Flagman—Statute and Ordinance.

Under Gen. Laws 1896, c. 187, § 47, providing that every railroad corporation operating a railroad in the state shall cause a flagman to be placed where railroads cross public highways, when, in the opinion of the town council, it is necessary for the public safety, and chapter 834, § 2, declaring that no highway shall be built across any railroad track at grade except by consent of the railroad commissioner, a railroad company is under no obligation to maintain a flagman at a grade crossing over a highway not authorized by the railroad commissioner, though the council has ordered that flagmen shall be provided at all grade crossings within the city limits.

Accident at Crossing—Failure to Stop, Look, and Listen—Direction of Verdict.*

A traveler on a highway was injured by a train at a crossing. The

*Contributory negligence in failing to stop, look, and listen, see Moser v. Union Traction Co. (Pa.), 7 R. R. R. 632, 30 Am. & Eng. R. Cas., N. S., 632 (street crossing); Southern Ry. Co. v. Aldridge

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view of the track from the crossing was unobstructed for a distance of 1,700 feet in the direction from which the train was coming. From a point 50 feet back from the fence, on the street as he approached the crossing, the view of the track was unobstructed for 600 feet. When the whistle blew about 200 feet away, the traveler was 20 feet from the track, and, without stopping, looking, or listening, he drove along until the wagon was struck by the train: *held*, that he was guilty of contributory negligence warranting the direction of a verdict for the railroad company.

Action by Margaret McGoran, executrix of William McGoran, against the New York, New Haven & Hartford Railroad Company. Verdict for defendant. Case heard on plaintiff's petition for new trial. Petition denied.

Argued before STINESS, C. J., and DOUGLAS and JOHNSON, JJ.

Hugh J. Carroll, for plaintiff.

David S. Baker and Lewis A. Waterman, for defendant.

JOHNSON, J. This is an action of trespass on the case for negligence, brought by William McGoran, in his lifetime.

(Va.), 7 R. R. R. 59, 30 Am. & Eng. R. Cas., N. S., 59; Birmingham Southern R. Co. v. Powell (Ala.), 7 R. R. R. 806, 30 Am. & Eng. R. Cas., N. S., 806 (street car conductor injured in collision between his car and train); Selensky v. Chicago Great Western Ry. Co. (Iowa), 7 R. R. R. 756, 30 Am. & Eng. R. Cas., N. S., 756 (question for jury); Hackney v. Illinois Cent. R. Co. (Miss.), 7 R. R. R. 42, 30 Am. & Eng. R. Cas., N. S., 42 (deaf person crossing track); Waldron v. Boston & M. R. R. (N. H.), 7 R. R. R. 54, 30 Am. & Eng. R. Cas., N. S., 54 (negligence as matter of law); Green v. Los Angeles Terminal Ry. Co. (Cal.), 7 R. R. R. 117, 30 Am. & Eng. R. Cas., N. S., 117 (failure to look again); Barnhill v. Texas & P. Ry. Co. (La.), 7 R. R. R. 7, 30 Am. & Eng. R. Cas., N. S., 7 (care in proportion to danger); Day v. Boston & M. R. R. (Me.), 6 R. R. R. 626, 29 Am. & Eng. R. Cas., N. S., 626 (care required of traveler as affected by difficulties peculiar to crossing); Steber v. Chicago & N. W. Ry. Co. (Wis.), 6 R. R. R. 656, 29 Am. & Eng. R. Cas., N. S., 656 (failure to see train in plain view); Snell v. Minneapolis, etc., Ry. Co. (Minn.), 6 R. R. R. 636, 29 Am. & Eng. R. Cas., N. S., 636 (negligence of person in charge of cattle); Chicago City Ry. Co. v. Fennimore (Ill.), 6 R. R. R. 644, 29 Am. & Eng. R. Cas., N. S., 644 (failure to look just before crossing track); Guinney v. Southern Electric R. Co. (Mo.), 2 R. R. R. 820, 25 Am. & Eng. R. Cas., N. S., 820; Peck v. Oregon Short Line R. Co. (Utah), 4 R. R. R. 358, 27 Am. & Eng. R. Cas., N. S., 358 (question for jury); Ayres v. Pittsburgh, etc., Ry. Co. (Pa.), 1 R. R. R. 206, 24 Am. & Eng. R. Cas., N. S., 206 (obstructed view); Louisville & N. R. Co. v. Cooper (Ky.), 1 R. R. R. 230, 24 Am. & Eng. R. Cas., N. S., 230 (failure to look again); Mobile & O. R. Co. v. Coerver (C. C. A.), 1 R. R. R. 199, 24 Am. & Eng. R. Cas., N. S., 199 (direction of verdict for defendant); Hurley v. West End St. Ry. Co. (Mass.), 1 R. R. R. 229, 24 Am. & Eng. R. Cas., N. S., 229 (direction of verdict for defendant, in action for injury on street railway track); Selma Street & Suburban Ry. Co. v. Owen (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97 (duty of street car driver); Nashville Ry. v. Norman (Tenn.), 4 R. R. R. 350, 27 Am. & Eng. R. Cas., N. S., 350; Haas v. Chester St. Ry. Co. (Pa.), 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810; Peck v. Oregon Short Line R. Co. (Utah), 4 R. R. R. 358, 27 Am. & Eng. R. Cas., N. S.,

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against the New York, New Haven & Hartford Railroad Company, for damages for injuries received by him on the 18th day of November, 1899, while crossing a track of the defendant in Pawtucket, in consequence of his wagon being struck by a train owned and operated by the defendant. On the 2d day of August, 1901, the plaintiff died, and the executrix of his will thereupon entered her appearance in the case. At the trial of the case the presiding justice, on the conclusion of the plaintiff's testimony, directed the jury to return a verdict for the defendant.

The evidence shows that at the time the railroad was built, in 1875, the way which is now Webster street, with the land

358 (obstructed view); *Keenan v. Union Traction Co. (Pa.)*, 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64 (electric railway in the country); *Haas v. Chester St. Ry. Co. (Pa.)*, 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810 (absence of signals and failure to stop team); *Chicago, I. & L. Ry. Co. v. Reed (Ind.)*, 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627 (failure to give signals no excuse for failure to look and listen); *Haas v. Chester St. Ry. Co. (Pa.)*, 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810 (failure to stop negligence as matter of law); *Cleveland, etc., Ry. Co. v. Heine (Ind.)*, 1 R. R. R. 948, 24 Am. & Eng. R. Cas., N. S., 948 (failure to stop, look, and listen after passing train obstructing view); *Willfong v. Omaha & St. L. R. Co. (Iowa)*, 2 R. R. R. 792, 25 Am. & Eng. R. Cas., N. S., 792 (question for jury); *Knox v. Philadelphia & R. Ry. Co. (Pa.)*, 4 R. R. R. 371, 27 Am. & Eng. R. Cas., N. S., 371 (obstructed view); *Allen v. Kansas City, M. & B. R. Co. (Miss.)*, 4 R. R. R. 17, 27 Am. & Eng. R. Cas., N. S., 17 (view obstructed within few feet of track, peremptory instruction for defendant not warranted); *Metropolitan Street Ry. Co. v. Agnew (Kan.)*, 4 R. R. R. 589, 27 Am. & Eng. R. Cas., N. S., 589 (chargeable with notice of approach of car within range of vision); *Burian v. Seattle Electric Co. (Wash.)*, 1 R. R. R. 218, 24 Am. & Eng. R. Cas., N. S., 218; *Cincinnati, N. O. & T. P. R. Co. v. Wright (Ky.)*, 3 Am. & Eng. R. Cas., N. S., 441; *McCadden v. Abbot (Wis.)*, 3 Am. & Eng. R. Cas., N. S., 651; *McCanna v. New England R. Co. (R. I.)*, 10 Am. & Eng. R. Cas., N. S., 485; *Seamans v. Delaware, etc., R. Co. (Pa. St.)*, 4 Am. & Eng. R. Cas., N. S., 260; *Sullivan v. New York, etc., R. Co. (Pa. St.)*, 4 Am. & Eng. R. Cas., N. S., 260; *Texas & P. R. Co. v. Gentry (U. S.)*, 4 Am. & Eng. R. Cas., N. S., 559; *Haner v. Northern Pac. Ry. Co. (Idaho)*, 19 Am. & Eng. R. Cas., N. S., 628 (absence of evidence for plaintiff); *Consolidated Traction Co. v. Haight (N. J.)*, 8 Am. & Eng. R. Cas., N. S., 90 (as applied to street railways); *Hoelzel v. Crescent City R. Co. (La.)*, 8 Am. & Eng. R. Cas., N. S., 40; *Berkeley v. C. & O. Ry. Co. (W. Va.)*, 8 Am. & Eng. R. Cas., N. S., 757 (at crossing in street); *Steele v. Northern Pac. Ry. Co. (Wash.)*, 15 Am. & Eng. R. Cas., N. S., 129 (burden of proof); *Hecker v. Oregon R. Co. (Ore.)*, 23 Am. & Eng. R. Cas., N. S., 33 (care required in looking); *Baltimore, etc., Ry. Co. v. Peterson (Ind.)*, 20 Am. & Eng. R. Cas., N. S., 887 (care required of track repairer); *Weiss v. Bethlehem Iron Co. (C. C. A.)*, 12 Am. & Eng. R. Cas., N. S., 305 (care to be employed by employee crossing master's road); *Work v. Chicago, etc., Ry. Co. (C. C. A.)*, 20 Am. & Eng. R. Cas., N. S., 636 (contributory negligence and absence of negligence); *Atchison, T. & S. F. R. Co. v. Holland (Kan.)*, 12 Am. & Eng. R. Cas., N. S., 476 (contributory negligence a question of law); *Cook v. Los Angeles & P. Electric Ry. Co. (Cal.)*, 23 Am. & Eng. R. Cas., N. S., 69 (contributory negligence in driving upon track, where view is obstructed, question for jury); *Gilbert v. Erie R. Co. (C. C. A.)*, 18 Am. & Eng. R. Cas., N. S., 15; *Merritt v. Foote (Mich.)*,

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through which it ran, belonged to Terrence Daly, who, in his conveyance to the railroad company, reserved a right to himself, his heirs and assigns, to use this way over the tracks which were to be laid down by the railroad company; that Daly sold lots to people along the street, and these people used the way; that in 1893 the street was laid out as a highway by the city of Pawtucket.

Chapter 834, p. 23, of the Public Laws, passed May 2, 1890, provides: "Sec. 2. From and after the passage of this act, no railroad corporation shall lay out or build its road, or lay its tracks across any railroad, street, highway, turnpike, or traveled way at grade, and no street, highway, turnpike, or

23 Am. & Eng. R. Cas., N. S., 43 (contributory negligence in failing to look immediately before crossing street railway tracks); Pyle *v.* Clark (Utah), 5 Am. & Eng. R. Cas., N. S., 156 (contributory negligence in failing to stop and look a question of law); Illinois Cent. R. Co. *v.* Jones (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 16 (contributory negligence of boy driving who failed to stop, look, and listen was for jury); Gobleigh *v.* Grand Trunk R. Co. (Vt.), 5 Am. & Eng. R. Cas., N. S., 445 (question for jury); Payne *v.* Chicago & A. R. Co. (Mo.), 6 Am. & Eng. R. Cas., N. S., 291 (credibility of plaintiff's testimony as to stopping, looking, and listening); Beecher *v.* Long Island R. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 295 (crossing track at station to board train without looking and listening); Cookson *v.* Pittsburg & W. R. Co. (Pa.), 6 Am. & Eng. R. Cas., N. S., 340 (description of crossing and admissibility of opinion evidence as to the relative dangers of places to stop, look, and listen); Gahagan *v.* Boston & M. R. R. (N. H.), 23 Am. & Eng. R. Cas., N. S., 141 (direction of verdict for defendant); Chase *v.* Maine Cent. R. R. (Mass.), 6 Am. & Eng. R. Cas., N. S., 343 (driver approaching crossing with reins loose and without attempting to stop or slacken speed until horse was about to cross track); Bush *v.* Union Pac. R. Co. (Kan.), 20 Am. & Eng. R. Cas., N. S., 798 (driver's failure to do so imputable to his passenger); Born *v.* Philadelphia & R. R. Co. (Pa.), 22 Am. & Eng. R. Cas., N. S., 723 (driving in front of moving train, where absence of evidence of having stopped within reasonable distance); Law *v.* Lake Shore & M. S. R. Co. (Mich.), 15 Am. & Eng. R. Cas., N. S., 95 (duty of bicyclist to dismount before crossing where view is obstructed); Silcock *v.* Rio Grande W. Ry. Co. (Utah), 18 Am. & Eng. R. Cas., N. S., 459 (duty of one driving to look and listen); Atlantic City R. Co. *v.* Goodin (N. J.), 14 Am. & Eng. R. Cas., N. S., 291 (duty of passenger crossing track at station to stop, look, and listen); Betts *v.* Lehigh Val. R. Co. (Pa.), 14 Am. & Eng. R. Cas., N. S., 299; Graven *v.* MacLeod (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 305; McGrath *v.* North Jersey St. Ry. Co. (N. J.), 22 Am. & Eng. R. Cas., N. S., 790 (duty of pedestrian to look out for trolley cars); McGrath *v.* North Jersey St. Ry. Co. (N. J.), 22 Am. & Eng. R. Cas., N. S., 790 (duty of pedestrian to look out for vehicles); Guhl *v.* Whitcomb (Wis.), 20 Am. & Eng. R. Cas., N. S., 520 (duty of traveler); Central of Georgia Ry. Co. *v.* Forshee (Ala.), 18 Am. & Eng. R. Cas., N. S., 467; Conkling *v.* Erie R. Co. (N. J.), 15 Am. & Eng. R. Cas., N. S., 61 (duty to look and listen); Traver *v.* Spokane St. Ry. Co. (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (duty to look and listen inapplicable to street railways); Knopf *v.* Philadelphia, W. & B. R. Co. (Del.), 20 Am. & Eng. R. Cas., N. S., 172 (duty to look for cars where view obstructed); Sandberg *v.* St. Paul & D. R. Co. (Minn.), 18 Am. & Eng. R. Cas., N. S., 763 (duty to look more than once); McGill *v.* Minneapolis & St. L. R. Co. (Iowa), 20 Am. & Eng. R. Cas., N. S., 790 (failure of cattle

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road shall be laid out or built across any railroad track at grade, except by the consent of the railroad commissioner thereto, expressed in writing: provided, that if said railroad commissioner shall refuse to consent to any such crossing at grade, an appeal may be taken therefrom to the Supreme Court sitting en banc, of the county wherein said proposed grade crossing is located, and the decision of said court shall be final." There is no evidence that the consent of the railroad commissioner was given to the establishment of a grade crossing at the place in question, or that his consent to the same was ever asked until June, 1899; and it appears that, after a hearing, the railroad commissioner, on December 30,

driver to look and listen); *Blackburn v. Southern Pac. Co. (Ore.)*, 12 Am. & Eng. R. Cas., N. S., 461 (failure of driver to stop and listen at crossing where view is obstructed, contributory negligence per se); *Peterson v. St. Louis, I. M. & S. Ry. Co. (Mo.)*, 18 Am. & Eng. R. Cas., N. S., 161 (failure to as affected by speed in violation of ordinance); *Hearn v. New York, P. & N. R. Co. (Md.)*, 15 Am. & Eng. R. Cas., N. S., 54; *Ritzman v. Philadelphia & R. R. Co. (Pa.)*, 12 Am. & Eng. R. Cas., N. S., 444 (failure to, contributory negligence per se); *Gahagan v. Boston & M. R. R. (N. H.)*, 23 Am. & Eng. R. Cas., N. S., 141 (failure to give signal will not excuse failure to stop, look, and listen); *Cole v. New York, N. H. & H. R. Co. (Mass.)*, 18 Am. & Eng. R. Cas., N. S., 383 (failure to look); *Clark v. Wright (C. C. A.)*, 8 Am. & Eng. R. Cas., N. S., 431 (failure to look and listen); *Conkling v. Erie R. Co. (N. J.)*, 15 Am. & Eng. R. Cas., N. S., 61; *Pyle v. Clark (C. C. A.)*, 8 Am. & Eng. R. Cas., N. S., 431; *Chicago, etc., Ry. Co. v. Hoover (Ind. Ter.)*, 23 Am. & Eng. R. Cas., N. S., 73 (failure to look and listen at street crossing not negligence per se, where there are watchmen and gates, and gates are up); *Atchison, T. & S. F. R. Co. v. Holland (Kan.)*, 12 Am. & Eng. R. Cas., N. S., 476 (failure to look and listen contributory negligence per se); *Cawley v. La Crosse City Ry. Co. (Wis.)*, 12 Am. & Eng. R. Cas., N. S., 453; *Smith v. Boston & M. R. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 320 (failure to look and listen not contributory negligence as matter of law); *Bush v. Union Pac. R. Co. (Kan.)*, 20 Am. & Eng. R. Cas., N. S., 798 (failure to look and listen where injury was caused by "wild train"); *Hecker v. Oregon R. Co. (Ore.)*, 23 Am. & Eng. R. Cas., N. S., 33 (failure to look at certain place, question for jury); *Knopf v. Philadelphia, W. & B. R. Co. (Del.)*, 20 Am. & Eng. R. Cas., N. S., 172 (failure to look for cars); *Cowden v. Shreveport Belt Ry. Co. (La.)*, 23 Am. & Eng. R. Cas., N. S., 355 (failure to look for electric street car); *Kallmerten v. Cowen (C. C. A.)*, 23 Am. & Eng. R. Cas., N. S., 352 (failure to look precluding recovery for death); *Illinois Cent. R. Co. v. Jones (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 16 (failure to stop, look, and listen at crossing not contributory negligence as a matter of law); *Pittsburg, C., C. & St. L. R. Co. v. Lewis (Ky.)*, 6 Am. & Eng. R. Cas., N. S., 333 (failure to stop, look, and listen, relying on railroad company to ring bell); *Lewis v. Long Island R. Co. (N. Y.)*, 18 Am. & Eng. R. Cas., N. S., 1 (failure to stop not negligence per se); *Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex.)*, 8 Am. & Eng. R. Cas., N. S., 141 (failure to submit to the jury whether a failure to look or listen under the facts stated constituted negligence); *Steele v. Northern Pac. Ry. Co. (Wash.)*, 15 Am. & Eng. R. Cas., N. S., 129 (infallibility of sight and hearing not required); *St. Louis & S. F. R. Co. v. Crabtree (Ark.)*, 20 Am. & Eng. R. Cas., N. S., 923 (instructions as to duty of traveler); *Central R. Co. of New Jersey v. Smalley (N. J.)*, 10 Am. & Eng. R. Cas., N. S., 463 (look and listen); *Central Texas & N. W. Ry. Co. v. Bush (Tex. Civ. App.)*, 3 Am. & Eng. R. Cas., N. S., 264;

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1899, refused such consent. The evidence is that the crossing was used by Daly and his assigns, and by others, from the time the railroad was built to the time of the accident; that there were fences partly across the street on each side of the railroad, with gates, said gates being from 10 to 14 feet in length, sufficient to admit of the passage of only one team at a time; that these gates were usually open, but were occasionally shut; that there was a plank on each side of the outside rails. There was also evidence that an order was made October 21, 1896, by the city council of Pawtucket, that flagmen should be provided at all grade crossings within the city limits. The plaintiff contends that the company was

Cleveland, C., C. & St. L. Ry. Co. *v.* Miller (Ind.), 9 Am. & Eng. R. Cas., N. S., 684; Pyle *v.* Clark (Utah), 5 Am. & Eng. R. Cas., N. S., 156; Fairbanks *v.* Bangor, O. & O. Ry. Co. (Me.), 22 Am. & Eng. R. Cas., N. S., 756 (look and listen rule not applicable to street railways); Pyle *v.* Clark (Utah), 5 Am. & Eng. R. Cas., N. S., 156 (look and listen, whether a question of law or fact); Burke *v.* Central R. Co. of New Jersey (N. J.), 19 Am. & Eng. R. Cas., N. S., 258 (looking and listening by pedestrian not always sufficient care); Atchison, T. & S. F. R. Co. *v.* Willey (Kan.), 15 Am. & Eng. R. Cas., N. S., 847; Tacoma Ry. & Power Co. *v.* Hays (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 58 (negligence per se in driving across street railway tracks in covered wagons); Philadelphia & B. C. R. Co. *v.* Holden (Md.), 22 Am. & Eng. R. Cas., N. S., 192 (obstructed view); Chicago, R. I. & P. Ry. *v.* Williams (Kan.), 12 Am. & Eng. R. Cas., N. S., 336 (obstructed view, duty of traveler); Leitch *v.* Chicago, etc., R. Co. (Wis.), 6 Am. & Eng. R. Cas., N. S., 777 (obstructed view); Willet *v.* Michigan Cent. R. Co. (Mich.), 9 Am. & Eng. R. Cas., N. S., 18 (obstruction of view by cars); McGill *v.* Minneapolis & St. L. R. Co. (Iowa), 20 Am. & Eng. R. Cas., N. S., 790 (passage of extra train no excuse for failure to look and listen); Judson *v.* Central Vermont R. Co. (N. Y.), 15 Am. & Eng. R. Cas., N. S., 7 (pedestrian not required to stop before crossing); Winter *v.* New York & L. B. R. Co. (N. J.), 23 Am. & Eng. R. Cas., N. S., 359 (place where person should look for cars); Northern Cent. Ry. Co. *v.* Medairy (Md.), 7 Am. & Eng. R. Cas., N. S., 526 (plaintiff's testimony that he stopped, looked, and listened, held unworthy of credit in view of the fact that the train could have been plainly visible for a long distance); Weller *v.* Chicago, M. & St. P. Ry. Co. (Mo.), 22 Am. & Eng. R. Cas., N. S., 61 (presumption that deceased looked and listened before going on track); Florida Cent. & P. R. Co. *v.* Foxworth (Fla.), 13 Am. & Eng. R. Cas., N. S., 469 (proximate cause where person near crossing failing to look and listen is injured by failure of company to observe statutory precautions); Hecker *v.* Oregon R. Co. (Ore.), 23 Am. & Eng. R. Cas., N. S., 33 (question for jury); Mackrall *v.* Omaha & St. L. R. Co. (Iowa), 19 Am. & Eng. R. Cas., N. S., 59; Davis *v.* Concord & M. R. R. (N. H.), 19 Am. & Eng. R. Cas., N. S., 68 (question for jury whether contributory negligence to fail to look or listen); Vant *v.* Chicago & N. W. Ry. Co. (Wis.), 12 Am. & Eng. R. Cas., N. S., 470 (speed in excess of ordinance does not affect contributory negligence in failing to stop, look, and listen at private crossing); Traver *v.* Spokane St. Ry. Co. (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (stop, look, and listen rule not applicable to street railways); Sullivan *v.* New York, N. H. & H. R. Co. (Conn.), 20 Am. & Eng. R. Cas., N. S., 108 (sufficiency of evidence of contributory negligence); Olson *v.* Northern Pac. Ry. Co. (Minn.), 23 Am. & Eng. R. Cas., N. S., 352 (sufficiency of evidence to show failure to look); Bond *v.* Lake Shore & M. S. Ry. Co. (Mich.), 12 Am. & Eng. R. Cas., N. S., 447 (failure to stop and

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negligent in not having a flagman at the crossing, in compliance with the order of the city council. The statute then in force (chapter 187 of the General Laws of 1896) provided: "Sec. 47. Every railroad corporation, or trustees of such corporation, operating a railroad within the state, shall cause flagmen to be placed wherever railroads cross public highways, whenever in the opinion of the town council it is necessary for the safety of the public." This, however, applied only to crossings over public highways. The establishment of a public highway across the railroad at grade could only be made with the consent of the railroad commissioner, expressed in writing. In the absence of such consent, the rail-

listen, contributory negligence); *Coppuck v. Philadelphia, W. & B. R. Co. (Pa.)*, 15 Am. & Eng. R. Cas., N. S., 68 (failure to stop and look as contributory negligence); *Darwood v. Union Traction Co. (Pa.)*, 12 Am. & Eng. R. Cas., N. S., 474 (failure to stop and look at street railway crossing where view is obstructed is contributory negligence); *Darwood v. Union Traction Co. (Pa.)*, 12 Am. & Eng. R. Cas., N. S., 474 (failure to stop and look before driving over street railway track where view is obstructed); *Cookson v. Pittsburg & W. R. Co. (Pa.)*, 6 Am. & Eng. R. Cas., N. S., 339 (failure to stop at certain point not negligence per se); *Smith v. Boston & M. R. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 320 (failure to stop horse when train approaching from short distance is not contributory negligence as matter of law); *Stafford v. Chippewa Val. Electric R. Co. (Wis.)*, 23 Am. & Eng. R. Cas., N. S., 364 (sufficiency of negative evidence of care in looking for car); *Bush v. Union Pac. R. Co. (Kan.)*, 20 Am. & Eng. R. Cas., N. S., 798 (what will excuse diversion of traveler's attention); *Guhl v. Whitcomb (Wis.)*, 20 Am. & Eng. R. Cas., N. S., 520; *Kelly v. Wakefield & S. St. Ry. Co. (Mass.)*, 23 Am. & Eng. R. Cas., N. S., 67 (whether negligence per se to drive upon track where view is obstructed, without looking or listening, immediately before going upon track); *Haines v. Lake Shore & M. S. Ry. Co. (Mich.)*, 1 R. R. R. 627, 24 Am. & Eng. R. Cas., N. S., 627; *Hamilton v. Consolidated Traction Co. (Pa.)*, 1 R. R. R. 233, 24 Am. & Eng. R. Cas., N. S., 233; *Sherwin v. Rutland R. Co. (Vt.)*, 3 R. R. R. 602, 26 Am. & Eng. R. Cas., N. S., 602 (question for jury); *Newman v. Delaware, L. & W. R. Co. (Pa.)*, 5 R. R. R. 526, 28 Am. & Eng. R. Cas., N. S., 526 (question for jury whether there was a better place to stop); *Willforg v. Omaha & St. L. R. Co. (Iowa)*, 2 R. R. R. 792, 25 Am. & Eng. R. Cas., N. S., 792 (reliance upon another to look and listen); *New York, etc., R. Co. v. Kistler (Ohio)*, 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340 (duty to look just before going upon track); *Corcoran v. Pennsylvania R. Co. (Pa.)*, 5 R. R. R. 523, 28 Am. & Eng. R. Cas., N. S., 523 (verdict properly directed for defendant); *Ayres v. Pittsburg, etc., Ry. Co. (Pa.)*, 1 R. R. R. 206, 24 Am. & Eng. R. Cas., N. S., 206 (whether duty to stop again on or between tracks); notes, 2 R. R. R. 342, 25 Am. & Eng. R. Cas., N. S., 342 (crossing tracks in compliance with directions or invitations of railroad employees); 7 Am. & Eng. R. Cas., N. S., 742; 10 Am. & Eng. R. Cas., N. S., 467, 489, 504; 12 Am. & Eng. R. Cas., N. S., 317 (duty of employee crossing track); 20 Am. & Eng. R. Cas., N. S., 793 (failure to stop, look, and listen before driving cattle across tracks); 19 Am. & Eng. R. Cas., N. S., 320 (failure to look and listen as affected by speed in violation of ordinance); 12 Am. & Eng. R. Cas., N. S., 445 (not negligence per se); 12 Am. & Eng. R. Cas., N. S., 446 (Pennsylvania rule); 6 Am. & Eng. R. Cas., N. S., 570; 10 Am. & Eng. R. Cas., N. S., 467 (obstructed view); 7 Am. & Eng. R. Cas., N. S., 742 (plaintiff's evidence rebutted by circumstantial evidence).

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road company would be under no obligation to maintain a flagman at the crossing.

The testimony, however, fails to show due care on the part of William McGoran at the time of the accident. It appears that the view of the railroad track from the crossing was clear and unobstructed for a distance of 1,700 feet in the direction from which the train was coming, and that from a point 50 feet back from the fence, on the street as he approached the crossing, the view of the track was unobstructed for 600 feet; also that when the whistle blew at Coyle avenue, about 200 feet away, he was 20 feet or more from the track on which the team was struck; that he did not stop, look, or listen, but drove right along until the wagon was struck. The verdict for the defendant was therefore rightly directed.

Petition for new trial denied, and case remanded to the common pleas division, with direction to enter judgment upon the verdict.

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(Supreme Court of New Jersey, June 12, 1903.)

[55 Atl. Rep. 100.]

Railroads—Injury to Person on Track—Contributory Negligence.*

One failing to see an engine approaching because he did not look as he stepped on the railway track is negligent, precluding a recovery for the injuries sustained by being struck by the engine.

Action by Antoni Dwajakowski against the Central Railroad Company of New Jersey. On rule to show cause. Rule absolute.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Cowles & Carey, for plaintiff.

George Holmes and W. D. Edwards, for defendant.

PER CURIAM. The plaintiff, desiring to take a train of the defendant company at its station at Greenville for the purpose of going to Plainfield, approached the station on the side of the east-bound track. There was an overhead passageway provided for passengers desiring to cross over the tracks for the purpose of taking west-bound trains. This, the plaintiff says, he failed to observe. The east-bound and west-bound tracks were separated by a fence, in one portion of which there was a gate, put there for the purpose of transporting baggage from one side of the road to the other. The plaintiff's story is that this gate was open, and that, supposing it was for the purpose of enabling passengers to pass through from one side of the tracks to the other, he attempted

*Failure to stop, look and listen before attempting to cross railroad tracks, see preceding case and foot-note.

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to cross by that way. He says that before crossing he looked to see if the road was clear, and, observing that a freight train was approaching, with several cars attached to it, he waited until it had passed, and then, seeing nothing else which threatened danger, stepped upon the track, and was immediately struck down by a caboose, which was running wild, and following the freight train. He excuses himself from having failed to observe the approach of the caboose by saying that his vision was obscured by the presence of a heavy fog, and by the smoke thrown out by the engine which had just passed him.

It is claimed on the part of the defendant company that, on the plaintiff's own story, he should have been nonsuited, because it affirmatively appears that he was negligent in failing to observe the approach of this caboose. Whether, under the peculiar circumstances detailed by the plaintiff, he can be said to have been negligent, we do not find it necessary to determine; for, on the whole case, it has been clearly shown that the plaintiff was not struck down by a caboose running wild, and following closely behind a freight train which had passed him; that in fact no freight train at all passed Greenville station at or about the time of the accident; and that he was injured by stepping in front of an engine which was running backward, and drawing a caboose after it. If he failed to see this engine approaching, it was because he failed to look before stepping upon the track, and such failure was clearly negligence on his part. If he did see it, and took the risk of attempting to cross in front of it, he has no one but himself to blame for the injury which resulted.

The rule to show cause should be made absolute.

FRANK v. PENNSYLVANIA R. CO.

(*Supreme Court of New Jersey, July 27, 1903.*)

[55 Atl. Rep. 691.]

Railroads—Injuries at Crossing—Signals—Ringing Bell—Evidence—Verdict.*

Where, in an action for death at a railroad crossing, the negligence alleged was defendant's failure to give the statutory signal by ring-

*As to the comparative weight of positive and negative testimony as to whether crossing signals were given, see foot-note appended to *Selensky v. Chicago Great Western Ry. Co.* (Iowa), 7 R. R. R. 756, 30 Am. & Eng. R. Cas., N. S., 756; *Jones v. Lehigh & N. E. R. Co.* (Pa.), 2 R. R. R. 26, 25 Am. & Eng. R. Cas., N. S., 26; *Knox v. Philadelphia & R. Ry. Co.* (Pa.), 4 R. R. R. 371, 27 Am. & Eng. R. Cas., N. S., 371; notes, 19 Am. & Eng. R. Cas., N. S., 386; *Mackrall v. Omaha & St. L. R. Co.* (Iowa), 19 Am. & Eng. R. Cas., N. S., 59; *Edwards v. Atlantic Coast Line R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 38; *Haun v. Rio Grande W. Ry. Co.* (Utah), 19 Am. & Eng. R. Cas., N. S., 370.

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ing the bell, and there was positive evidence by numerous witnesses that the bell was rung, and the only evidence to the contrary was from witnesses whose attention had not been aroused, except one, who testified that he listened and failed to hear the bell, but whose testimony was seriously discredited, a verdict finding that the bell was not rung was contrary to the evidence.

Action by Samuel Frank, by his next friend, against the Pennsylvania Railroad Company. On rule to show cause why a new trial should not be granted. Rule absolute.

Argued February term, 1903, before GUMMERE, C. J., and FORT and PITNEY, JJ.

Benjamin M. Weinberg, for plaintiff.

Vredenburgh, Wall & Van Winkle, for defendant.

PER CURIAM. This was a crossing accident. We think the verdict is against the clear weight of the evidence upon the question of the failure of defendant's employees to give the statutory signal by ringing the locomotive bell. The evidence that the bell was rung was clear and positive, and proceeded from the mouths of numerous witnesses, all of whom must be guilty of deliberate perjury if in fact the bell was not rung. The evidence to the contrary, except that of Burke, proceeded from witnesses whose attention was not aroused. Burke testifies that he listened and failed to hear a bell, but his testimony is seriously discredited.

The rule to show cause will be made absolute.

FRANK v. PENNSYLVANIA R. Co.

(Supreme Court of New Jersey, July 27, 1903.)

[55 Atl. Rep. 691.]

Crossings—Signals—Evidence.*

Where, in an action for death at a railroad crossing, the negligence alleged was defendant's failure to give statutory signals by ringing the locomotive bell, and the evidence that the bell was rung was clear and positive, and the only evidence to the contrary, except certain witnesses whose attention was not aroused, was the testimony of one witness, whose testimony was seriously discredited, a verdict finding that the bell was not rung was contrary to the evidence.

Excessive Verdict.

In an action for death, a verdict awarding \$10,000 was so grossly excessive as to warrant an inference of prejudice on the part of the jury.

Action by Ida Frank, as administratrix of the estate of Jacob Frank, deceased, against the Pennsylvania Railroad Company. On motion to show cause why a new trial should not be granted. Rule absolute.

*As to the comparative weight of positive and negative testimony as to whether crossing signals were given, see preceding case and foot-note.

Kuntz v. New York, etc., R. Co

Argued February term, 1903, before GUMMERE, C. J., and FORT and PITNEY, JJ.

Benjamin M. Weinberg and Samuel Kalisch, for plaintiff.
Vredenburg, Wall & Van Winkle, for defendant.

PER CURIAM. This was a crossing accident. We think the verdict is against the clear weight of the evidence upon the question of the failure of defendant's employees to give the statutory signal by ringing the locomotive bell. The evidence that the bell was rung was clear and positive, and proceeded from the mouths of numerous witnesses, all of whom must be guilty of deliberate perjury, if in fact the bell was not rung. The evidence to the contrary, except that of Burke, proceeded from witnesses whose attention was not aroused. Burke testifies that he listened and failed to hear a bell, but his testimony is seriously discredited. We think, also, that there was strong evidence of negligence on the part of the plaintiff's intestate.

The damages awarded (\$10,000) are so grossly excessive as to confirm the view that the jury was prejudiced.

The rule to show cause will be made absolute.

KUNTZ v. NEW YORK, C. & ST. L. R. CO.

(*Supreme Court of Pennsylvania, May 11, 1903.*)

[55 Atl. Rep. 915.]

Accident at Crossing—Signals—Question for Jury.*

Where, in an action for injuries at crossing, the evidence of defendant was that the proper signals were duly given by the approaching train, and three witnesses for plaintiff testified that they were listening for some signals and heard none, the question of whether the proper signals were given was for the jury.

Same—Contributory Negligence—Question for Jury.

In an action for injuries at a crossing, *held*, that the question of plaintiff's contributory negligence was, under the evidence, for the jury.

Assignments of Error.

Assignments founded on errors alleged to have been committed by the court in referring to the testimony, not brought to his attention at the time, will not be considered.

Appeal from Court of Common Pleas, Erie County.

Action by Frank Kuntz against the New York, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

*As to the comparative weight of positive and negative testimony as to whether crossing signals were given, see foot-note appended to preceding case.

Frank Gunnison, for appellant.

J. M. Sherwin, S. A. Davenport, and A. P. Howard, for appellee.

FELL, J. The principal error assigned is that the court did not take the case from the jury on the grounds (1) that there was not sufficient evidence of negligence on the part of the defendant to warrant a recovery; (2) that the plaintiff failed to present a case clear of contributory negligence on his part.

The weight of testimony on the question whether proper notice was given of the approach of the train to the crossing was undoubtedly with the defendant. But three witnesses on behalf of the plaintiff testified that they were listening for some signal by bell or whistle of the approach of the train and heard none. This testimony was more than a scintilla, and of a higher grade than merely negative testimony. *Longenecker v. Railroad Co.* 105 Pa. 328; *Quigley v. Del. & H. Canal Co.*, 142 Pa. 388, 21 Atl. 827, 24 Am. St. Rep. 504; *Daubert v. Delaware, etc., Railroad Co.*, 199 Pa. 345, 49 Atl. 72. It raised an issue that was clearly for the jury.

The facts that must be considered as established in determining whether the plaintiff was negligent are these: With two companions, he was going to his work at 6 o'clock in the morning in the early part of February. This was before daylight, and a snowstorm of unusual force and severity was prevailing. The temperature was 6 degrees above zero, and the wind was blowing at the rate of 30 miles an hour. Several inches of snow had fallen. Drifts had formed on the sidewalks, and these men were walking in the middle of the street. When they reached the crossing of the defendant's road in a populous part of the city of Erie, they stopped within five feet of the track, and looked both ways, and listened for the sound of a bell or whistle. They heard neither, and walked on the single track, and the plaintiff was struck by an engine which was running 35 or 40 miles an hour on a down grade with the steam off. The headlight of the engine was to some extent obscured by the snow that clung to the glass and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight, under ordinary circumstances, when 1,500 feet away. The court instructed the jury that, if the accident had occurred on a clear morning, or in the daytime, when the headlight of the engine could have been seen, the plaintiff could not recover. But it was left to the jury to say whether, under the circumstances, the plaintiff's view being obstructed by wind and snow, he had exercised reasonable care. This instruction was correct. The question of contributory negligence cannot be treated as one of law unless the facts and the inferences to be drawn from them are free from doubt. If there is doubt as to either, the case is for the jury. It was the duty of the plaintiff to stop, look, and listen before

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placing himself in a position of danger, and to continue to look as he approached and crossed the track. Ordinarily, a pedestrian, when there is nothing to prevent his seeing and hearing, will not be heard to say that he did not see a train which could have been plainly seen if he had looked. But the rule established by *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, and *Marland v. Railway Co.*, 123 Pa. 487, 16 Atl. 624, 10 Am. St. Rep. 541, 16 L. R. A. 624, and since followed, is applicable only in clear cases where a person steps in front of a moving train which he could see. *McNeal v. Railway Co.*, 131 Pa. 184, 18 Atl. 1026; *Laib v. Railroad Co.*, 180 Pa. 503, 37 Atl. 96; *Muckinhaupt v. Railroad Co.*, 196 Pa. 213, 46 Atl. 364; *Bard v. Railway Co.*, 199 Pa. 94, 48 Atl. 684. According to his testimony, the plaintiff in this case did not proceed recklessly in crossing the defendant's tracks. He stopped within five feet of them to ascertain whether a train was approaching. The storm prevented his seeing more than 50 or 100 feet, and made his progress more difficult. Whether, under the circumstances, he exercised proper care, was for the jury.

The errors alleged to have been committed in referring to the testimony were not brought to the attention of the court at the time, and the assignments founded upon them need not be considered. *Provident Life & Trust Co. v. Philadelphia*, 202 Pa. 78, 51 Atl. 597, and cases there cited.

The judgment is affirmed.

MCDERMOTT v. BOSTON ELEVATED RY. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, Sept. 2, 1903.*)

[68 N. E. Rep. 34.]

Contributory Negligence—Child Crossing Street Railway.

For a child $6\frac{1}{2}$ years of age to pass over a crosswalk leading from one side of a street to the other while on her way to school, through which street runs a street railway track, is not of itself negligence as a matter of law.

Same—Same—Failure to Look and Listen.*

That plaintiff, a child $6\frac{1}{2}$ years of age, while on her way to school

*As to whether the stop, look, and listen rule is applicable to street railway crossings, see foot-note appended to *Wolf v. City & Suburban Ry. Co.* (Ore.), 7 R. R. R. 777, 30 Am. & Eng. R. Cas., N. S., 777; *Daum v. North Jersey St. Ry. Co.* (N. J.), 7 R. R. R. 814, 30 Am. & Eng. R. Cas., N. S., 814; *Adams v. Wilmington & N. Electric Ry. Co.* (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307; *Nashville Ry. v. Norman* (Tenn.), 4 R. R. R. 350, 27 Am. & Eng. R. Cas., N. S., 350; *Kaiser v. New Orleans & C. R. Co.* (La.), 4 R. R. R. 237, 27 Am. & Eng. R. Cas., N. S., 237; *McNab v. United Rys. & Electric Co.* (Md.), 2 R. R. R. 39, 25 Am. & Eng. R. Cas., N. S., 39 (electric railway in the country); *Keenan v. Union Traction Co.* (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64 (electric railway in the country); *Haas v. Chester St. Ry. Co.* (Pa.), 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810; *Chisholm v. Seattle Electric Co.* (Wash.), 1 R. R. R. 635, 24 Am. & Eng. R. Cas., N. S., 635.

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crossed a street on which a street railway was operated, at a crossing, when she could have seen a car approaching had she looked, failed to look or listen before attempting to cross, did not constitute contributory negligence as a matter of law, precluding a recovery for injuries sustained by her being struck by the car.

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Action by one McDermott against the Boston Elevated Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions sustained.

Francis P. Curran, for plaintiff.

E. P. Saltonstall, for defendant.

BRALEY, J. At the time of the accident the plaintiff, a child 6½ years of age, was on the crosswalk at the intersection of Highland avenue with Cherry street, in the city of Somerville; and as she was passing over the track of the defendant one of its cars struck her. The defendant offered no evidence at the trial, but at the close of the plaintiff's case asked the court to rule that she was not in the exercise of due care, and could not recover. The court so ruled, and the case is here on her exception to the ruling.

The plaintiff did not testify, but from the evidence set out in the exceptions it appears that she was on her way to school with other children. The schoolhouse, known as the "Burns School," was on Cherry street, which ran westerly from the westerly side of Highland avenue, and to reach it the plaintiff, and other children from the same section of the city attending that school, would be obliged to pass over Highland avenue at the crosswalk that ran from the east side of the avenue to Cherry street. While walking with the other children, some of whom preceded her, as she came up to the crosswalk through which ran the track of the defendant, and when within six or seven feet of the rail, the car that struck her was about 140 feet distant, and in full view from the crossing. At that time the conductor in charge of the car, which was running at "a pretty good rate of speed," first saw her, and, while it would be obvious to any one in the motor-man's place that children were in the street and passing over the crossing, the gong was not sounded until the car was within 10 or 15 feet of the plaintiff, who does not appear to have either seen it coming or heard the gong. The children in front of her kept on walking over the track. She followed, and as she stepped on the rail the accident happened.

It cannot be held as a matter of law that for a child 6½ years of age to pass over a crosswalk that leads from one side of a street to the other, while on her way to school, and through which runs the track of a street railway, is of itself negligence. The question is narrowed to the inquiry, ought the plaintiff, when she could have seen the car, to have looked to see if one was coming, and also to have listened for the

sound of the gong before attempting to cross the street, and, she having failed to do so, must therefore be held to have been guilty of such contributory negligence as bars her recovery?

In the cases that from time to time have been before this court in which the due care of children of tender years, while travelers upon the public ways, has been discussed, it has been said that the child "is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise." *Collins v. South Boston Railroad*, 142 Mass. 301, 314, 7 N. E. 856, 56 Am. St. Rep. 675, and cases cited. The principle is clearly defined, but the difficulty arises in its application to the facts of different cases, and it often becomes a matter of great perplexity and doubt to determine if the child is of such tender years that the rule cannot be held to govern, and the doctrine of imputed negligence as applied to the conduct of parents, or those intrusted with his care, must be invoked. A child may be so young in years that if allowed by his parents, or those having custody of his person, to go unattended on the highways, such conduct on their part would unhesitatingly be condemned by the average judgment of men as careless, and to be imputed to the child if he should thereby be injured. It was accordingly held that to allow a child 2½ years old, unattended, to pass across a public street in a city, and which was traversed by a horse railroad, was *prima facie* evidence of want of due care of those having him in charge. *Wright v. Malden & Melrose Street Railroad Co.*, 4 Allen, 283, 289. See *Butler v. New York, New Haven & Hartford Railroad Co.*, 177 Mass. 191, 58 N. E. 592; also *Cotter v. Lynn & Boston Railroad Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267.

But in *Lynch v. Smith*, 104 Mass. 52, 6 Am. St. Rep. 188, and in *Hayes v. Norcross et al.*, 162 Mass. 546, 39 N. E. 282, the plaintiffs being respectively 4 years and 7 months and 5 years and 6 months of age, on the facts disclosed it was said that the issues involved were, did the plaintiff possess that degree of intelligence and knowledge that he could properly be allowed to go alone through the street? and, if it was found that he did, then did he use such care as an ordinarily prudent and careful boy of his age is accustomed to use under like circumstances? "School children who are properly sent to school, unattended, must use such reasonable care as school children can. It must be reasonable and adapted to the circumstances, or, in other words, the ordinary care of school children." The case at bar falls within the law of these cases, and whether a child of the age of the plaintiff is sufficiently intelligent to be allowed to attend the public schools in the ordinary way, unaccompanied, as well as the degree of foresight required of and used by the plaintiff under the circumstances, as shown by the evidence, are to be determined

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as questions of fact. *Lynch v. Smith*, ubi supra; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788. The evident willingness to take chances, and the accompanying spirit of recklessness on the part of the plaintiff, that appears in cases like *Messenger v. Dennie*, 137 Mass. 197, 50 Am. St. Rep. 295; *Mullen v. Springfield Street Railway*, 164 Mass. 450, 41 N. E. 664; *Morey v. Gloucester Street Railway Co.*, 171 Mass. 164, 50 N. E. 530; and *Sewell v. N. Y., N. H. & H. R. R. Co.*, 171 Mass. 302, 50 N. E. 541—are wanting in this case.

The relative rights of the parties in the use of the street are clear. The plaintiff had a right to the use of the street as a traveler for the purpose of going to school, equal to that of the defendant to run its cars therein as a common carrier of passengers. It is difficult to distinguish in principle this case from *O'Shaughnessey v. Suffolk Brewing Co.*, 145 Mass. 569, 14 N. E. 779. In that case a girl 8 years and 1 month old, while on her way to school, sat down on the edge stone of the sidewalk for the purpose of sharpening a slate pencil. She knew that there was much driving on the street, and did not at any time look to see if a wagon was coming. As she sat with one leg under her and the other leg projecting into the street, she was struck by a wagon belonging to the defendant and run over, and the question if at the time she was in the exercise of due care was held to have been properly submitted to a jury. Here the plaintiff was properly on the crosswalk, where foot travelers crossing Highland avenue at that point would be, and had a right to rely on the presumption that the servants of the defendant, knowing the use of the walk by children going to the Burns School, would pay that regard to those lawfully in the street at that place which reasonable care and diligence required. It might be found that it would be childlike and natural for her to follow her companions, and to pay no close attention to surrounding conditions. For these reasons it cannot be said as matter of law that the plaintiff's failure either to look and ascertain if a car was coming, or to listen for the ringing of the gong, or to fully appreciate the possibility that cars passing the crossing would run at such speed that she might be struck before she passed over the track, was contributory negligence. *Plumley v. Birge*, 124 Mass. 57, 26 Am. St. Rep. 645; *Moynihan, Adm'r, v. Whidden et al.*, 143 Mass. 287, 292, 9 N. E. 645; *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257; *Aiken v. Holyoke Street Railway Co.*, 180 Mass. 8, 61 N. E. 557.

Upon the evidence a jury could find that the plaintiff was in the exercise of such care as might be expected of the ordinarily prudent child of her age, and there must be a new trial.

Exceptions sustained.

BOBB v. UNION TRACTION CO.

(Supreme Court of Pennsylvania, May 18, 1903.)

[55 Atl. Rep. 972.]

Injury to Employee—Contributory Negligence.*

Where a motorman, on reaching a street crossing with his car, failed to look for an approaching car, and a collision resulted, he was guilty of contributory negligence, preventing recovery.

Appeal from Court of Common Pleas, Philadelphia County.

Action by James Bobb against the Union Traction Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas A. Fahy, for appellant.

Thomas Leaming and Russell Duane, for appellee.

FELL, J. The plaintiff was a motorman in charge of one of the defendant's cars, which was running south on Twenty-Second street. When it reached the north side of Market street, which is crossed by Twenty-Second street at right angles, he stopped at the crossing to let passengers get off and on. When signaled to go on, he looked both ways, and saw a car approaching from the east on Market street, on the north track, which is 20 feet from the curb. This car was 150 feet from the place where the tracks crossed. He then started his car, and proceeded slowly at the rate of a mile and a half an hour across Market street without looking again. A collision occurred, in which his car was struck about the middle by the Market street car. When he started from the crossing, the Market street car was within 60 feet of the Twenty-Second street tracks, running on a down grade at the rate of five miles an hour, and the motorman had lost control of it. If the plaintiff had looked again before attempting to cross the track, he would have seen the Market street car within 20 feet of him, and would have observed the ineffectual attempts of its motorman to stop it. It was his duty to look again, notwithstanding that the rules of the company gave him the right of way. We have repeatedly held that the duty of persons walking or driving at a street crossing to look for an approaching car is imperative, and that it is not performed by looking when first entering the street, but continues until the track is reached. *Burke v. Union Traction Co.*, 198 Pa. 497, 48 Atl. 470, and cases there cited; *Pieper v. Union Traction Co.*, 202 Pa. 100, 51 Atl. 739. This rule is equally imperative in the case of motormen, and the one first reaching a street crossing with his car may not go on, and, by casting the whole burden of care on the other, imperil the property of the company and the lives of the pas-

*As to whether the stop, look, and listen rule is applicable to street railway crossings, see preceding case and foot-note.

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sengers in his car. The court was clearly right in entering a nonsuit on the ground stated—that the plaintiff was negligent in attempting to cross Market street without looking again for a car. There are other grounds on which a nonsuit would be sustained, but we rest the affirmance of the judgment on this one, in order that there may be plain and distinct notice of the duty of motormen in this regard.

The judgment is affirmed.

WILMAN v. PEOPLE'S RY. CO.

(*Superior Court of Delaware, New Castle, Feb. 17, 1903.*)

[55 Atl. Rep. 332.]

Streets—Use by Street Railways and Public.

The rights of a street railway and the public to use the streets of a city must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other.

Street Railways—Care Required to Avoid Collisions.

A street car company, in operating its cars in a street, must move them at a reasonable rate of speed, and reduce the speed or stop, if need be, when danger is imminent.

Same—Stop, Look, and Listen.

Persons using the streets of a city on which street cars are operated are required to use reasonable care to avoid collision by stopping, and, if need be, turning out and keeping off the tracks in the presence of danger.

Same—Same.*

A person attempting to cross a street railway track is bound to look for approaching cars in time, if possible, to avoid collision, and, if he does not look and does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence.

Same—Use of Street—Rights of Public and Company.

Though the right of a street railway within its lines to use the street is superior to that of other users of the street, the public, in the exercise of due care, are entitled to cross the tracks as well within the blocks as at street crossings, in which case both the traveler and the railway company are required to use care, commensurate with the danger, to prevent a collision.

Personal Injuries—Damages—Elements.

A person injured by reason of a collision with a street railway car is entitled to recover for pain and suffering, loss of power to labor, in the past and in the future, resulting from the injuries, loss of time and necessary expense in procuring labor which but for his injuries he would have performed himself, and expenses for medicine and medical attendance.

Action by Jacob Wilman against the People's Railway Company for damages for personal injuries, also for injuries

*As to the duty to stop, look, and listen before crossing street railway tracks, see foot-note appended to *Beerman v. Union R. Co.* (R. I.), 5 R. R. R. 707, 28 Am. & Eng. R. Cas., N. S., 707; *Kernan v. Market St. Ry. Co.* (Cal.), 6 R. R. R. 471, 29 Am. & Eng. R. Cas., N. S., 471; *Wolf v. City & Suburban Ry. Co.* (Ore.), 7 R. R. R. 777, 30 Am. & Eng. R. Cas., N. S., 777; *Daum v. North Jersey St. Ry. Co.* (N. J.), 7 R. R. R. 814, 30 Am. & Eng. R. Cas., N. S., 814. See also, preceding case and foot-note.

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to horse and wagon and loss of milk, occasioned by a collision of a car of the defendant company with the milk wagon of the plaintiff on East Second street, in the city of Wilmington. Verdict for defendant.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Levin I. Handy, for plaintiff.

William S. Hilles, for defendant.

BOYCE, J. (charging jury). This action is brought for the recovery of damages for injuries to the person and property of the plaintiff, alleged to have been sustained by him by reason of the negligence of the defendant company. The issue presented is essentially one of fact, to be determined by you from the evidence as disclosed by the witnesses.

In a case like this, the right of action by the plaintiff rests upon the negligence, if any, of the defendant. It is, therefore, incumbent upon the plaintiff to establish, by a preponderance of the evidence, that the injuries complained of resulted from the negligence of the defendant company. Negligence is never presumed; it must be proved.

This case is similar in many respects to the case of Snyder against the defendant company, which was recently tried in this court (53 Atl. 433). Adopting the language of the court in that case, so far as it is applicable to the facts in this, we say to you that Second street, in this city, is a public highway. The defendant company uses and has the right to use that street for the purposes of its railway thereon, and the public have the right to use that and the intersecting streets for the ordinary purposes of a public street. The railway company and the public are required by law to use due and proper care in the exercise of their respective rights. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other. Price v. Charles Warner Co., 1 Pennewill, 462, 42 Atl. 699. And it is the duty of the company to provide competent and careful motormen and servants, to see that they use reasonable care in operating the cars, that the cars move at a reasonable rate of speed, and that they slow up or stop, if need be, where danger is imminent. There is a like duty of exercising reasonable care, on the part of people who may otherwise use such highway, to stop, and, if need be, to turn out and keep out of the tracks of the cars in the presence of danger. Brown v. Railway Co., 1 Pennewill, 332, 40 Atl. 936.

We will not attempt to specify the precise acts of precaution which are necessary to be done or omitted by one in the management of an electric car, or by one in the management of a wagon approaching the railway track or attempting to cross the same. Such acts must depend upon the circum-

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stances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car, and the person in the management of the wagon, are bound to the reasonable use of their sight and hearing for the prevention of accident, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would use under like circumstances. What is due and proper care depends upon the facts in each case. A person approaching a railway track or attempting to cross it, whether at a street crossing or at any other point along the street upon which it is laid, is bound to avail himself of his knowledge of the fact that the track is laid in the street, and act accordingly. If he approaches the track, or attempts to cross it, he is bound to look for approaching cars in time, if possible, to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence. *Price v. Chas. Warner Co.*, supra.

It has been held by this court that the right of a street railway company, within its lines, is superior to that of other users of the street, and must not be unnecessarily interfered with or obstructed. *Maxwell v. Railway Co.*, 1 Marv. 199, 40 Atl. 945, and *Brown v. Railway Co.*, 1 Pennewill, 335, 40 Atl. 936. But, as was said in *Price v. Warner*, supra, "the broad assertion of the superior right of a railway company may be subject to abuse, and should not be understood as exempting it in any case from the exercise of due and proper care." The public, using due care, have the right, in vehicles or on foot, to cross railway tracks, as well within the blocks as at street crossings. The company and the traveler are required to use such reasonable care as the circumstances of the case demand, an increase of care on the part of both being required where there is an increase of danger.

Even though the defendant company may have been negligent upon its part, yet if the negligence of the plaintiff contributed or entered into the accident, at the time of the injuries complained of, your verdict should be for the defendant, as the plaintiff in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party. If the injuries to the person and property of the plaintiff were occasioned by the negligence of the defendant company, or of its servants or agents, or any of them, and without the fault and negligence of the plaintiff, then your verdict should be for the plaintiff. If your verdict should be for the plaintiff, it should be for such sum as will reasonably compensate him for the injuries to his property and his person. For this purpose, you should take into consideration the plaintiff's pain and suffering, and his loss of power to perform labor, in the past and in the future, which may be found by you to be

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the result of the injuries sustained by him; also his loss of time and necessary expenses in procuring labor which but for such injuries he would himself have performed; also his expenses for medicine and medical attendance received by reason of such injuries, and, if such injuries are of a permanent character, you should consider that fact in determining the amount of damages.

Verdict for defendant.

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(*Supreme Court of Iowa, June 1, 1903.*)

[95 N. W. Rep. 229.]

Street Railroad—Accident—Negligence.

Whether a motorman on a street car was negligent in becoming spellbound with fear on the discovery of the danger to plaintiff's intestate is a question for the jury under the circumstances.

On rehearing. Petition overruled.

For former opinion, see 93 N. W. 68.

McCLAIN, J. In a petition for rehearing counsel for appellee call attention to the statement in the foregoing opinion that: "If, instead of using the means within his control to stop the car after the danger to the deceased became apparent, he [the motorman] negligently failed to do so, or, as indicated by the testimony of one witness, became spellbound with fright, and allowed the car to run on, after seeing the danger of deceased, without shutting off the power or reversing it, and thus an injury was inflicted which might have been avoided, then the liability of the defendant would be sufficiently shown." The objection specifically is that this language indicates the view that if the motorman, after becoming aware of the danger to deceased, failed to avert such danger by reason of being spellbound with fright, the defendant would be liable regardless of whether the motorman was negligent. This is not the construction which should be put upon this language in the opinion. It is evident from the entire course of reasoning that the liability of the defendant must be predicated, under the circumstances discussed, upon the negligence of the motorman after becoming aware of the danger to deceased. If he did not avoid the injury by reason of becoming spellbound, and was, under the circumstances, not negligent in thus being spellbound, no liability of the defendant would be shown. It must, however, be a question for the jury whether the motorman was negligent in not acting by reason of this condition. This explanation we think is sufficient to show the meaning in which the language objected to is used. This is said not as indicating a conclusion different from that indicated in the opinion, but for the purpose of avoiding any misconstruction of this language in the event of a new trial.

The petition for rehearing is overruled.

HANLON v. MILWAUKEE ELECTRIC RY. & LIGHT CO.*(Supreme Court of Wisconsin, May 29, 1903.)*

[95 N. W. Rep. 100.]

Accidents at Crossings—Collision with Hose Cart—Negligence of Motorman.

Where, in an action for injuries to the driver of a hose cart in collision with a street car at a crossing, it was proved that the car was traveling at a speed of from 20 to 25 miles an hour; that nothing was done to check the speed until the car was within some 20 feet of collision, while plaintiff's team was in plain sight when the car was 100 feet from the crossing, and the motorman neglected to keep any lookout ahead during a run of some 80 feet of the approach to the crossing—a finding that the motorman was guilty of negligence was justified.

Same—Same—Contributory Negligence.

Whether plaintiff, the driver of a hose cart, injured in a collision with a street car at a crossing while driving to a fire, was guilty of contributory negligence in attempting to cross ahead of the car, was for the jury.

Same—Same—Same—Instruction.

In an action for injuries to the driver of a hose cart in collision with a street car at a crossing, an instruction to find that the driver was guilty of contributory negligence if he did not have his horses under control at the time he attempted to cross the tracks, without reference to any other circumstances, was properly refused.

Same—Same—Same—Knowledge of Speed.

Where the driver of a hose cart was justified in assuming that a street car would stop or slacken its speed to permit him to cross the tracks in accordance with the uniform custom, an instruction, in an action for injuries to him in a collision with a car, that a person approaching a street railroad track, and having a reasonable opportunity to judge of the speed of an approaching car, is bound to know such speed, and cannot assume that it is running at a speed consistent with ordinary care, and proceed on that assumption, was properly refused as inapplicable to the facts.

Same—Same—Same—Same.

The instruction was also erroneous as requiring a person having a reasonable opportunity to judge of the speed of a car to "know its correct speed," he being only required to reach the conclusion of an ordinarily prudent and intelligent man under the circumstances.

Same—Street Railways—Stop, Look, and Listen.*

An instruction that a person approaching a street car track is bound to look and listen, and continue to look and listen up to the last moment, when his acts would have been of any virtue in preventing a collision with a car, was inapplicable to the driver of a hose cart approaching a street railway crossing.

Ordinary Care—Instruction.

An instruction that ordinary care is such care as a man of ordinary care and prudence would have exercised under circumstances like those disclosed by the testimony in the case, was not erroneous because it did not require that the care should be such as "the great mass or majority of mankind would have exercised under similar circumstances."

Street Railways—Right of Way—Customs.

Where, in an action for injuries to the driver of a hose cart in collision with a street car, it was undisputed that it was the uniform

*As to whether the stop, look, and listen rule is applicable to street railway crossings, see preceding case and foot-note.

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custom of street cars to stop or slacken speed, and give fire apparatus the right of way, it was not error to charge that, inasmuch as such custom had been established by undisputed evidence, plaintiff was entitled to assume that defendants would comply therewith.

Evidence.

In an action for injuries to the driver of a hose cart in collision with a street car, evidence that witness, who was sitting on a sidewalk, had frequently heard the gong of a fire patrol wagon, which was similar to the gong on plaintiff's wagon, a distance of two blocks, was not objectionable on the ground that the conditions surrounding the witness and those surrounding the motorman were not identical.

Same.

Where, in an action for injuries by collision with a street car, the speed of the car was given by various witnesses at varying rates up to 25 miles an hour, and the motorman had testified that he had his power lever thrown to the second highest notch, but that the speed of the car was only 7 or 8 miles an hour, it was not error for the court on cross-examination to permit him to be asked whether or not the car in question was not a specially rapid one, to which he answered that, while it was not the most rapid, there were only two others which excelled it.

Damages—Sufficiency of Evidence.

In an action for injuries to the driver of a hose cart in a collision with a street car, evidence *held* to justify a finding of loss of future earning capacity.

Excessive Verdict.

Plaintiff, a fireman, 37 years of age, who had attained the rank of captain, with a salary of \$100 per month, was injured in a collision with a street car. His knee joint was permanently loosened and enfeebled, and his chest was crushed, certain of the ribs being broken in front and rear, and penetrating both the outer membrane and the pericardium, leaving adhesions which would permanently and seriously impair any violent exertions. His expenses for medical treatment had been about \$500, and he still continued to suffer two years after the injury. He retained his place in the fire department, but was unable to perform certain of the work necessary, by reason of his injuries: *held*, that a verdict of \$4,000 was not excessive.

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by Lawrence A. Hanlon against the Milwaukee Electric Railway & Light Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff, on October 17, 1900, was, and had been for a considerable time, a member of the fire department of Milwaukee. On that day, in response to an alarm of fire, and in performance of his duty, he proceeded to drive his hose wagon southward on Sixteenth street and across Vliet street, rapidly, as usual, some seven or eight miles an hour, sounding the rotary gong thereon, which, according to the evidence, was audible at a distance from two to eight blocks away. When he reached the north side of Vliet street, he discovered defendant's street car at a distance variously stated up to 100 feet east of the crossing, headed westward. It had been a uniform custom in Milwaukee for many years for the street cars to slacken or stop so as to give right of way to the fire department vehicles. Plaintiff assumed that the car would

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so stop, urged forward his galloping horses, but, as he got within a few feet of the track, saw that the car had not stopped nor slowed up, and attempted to swerve his horses westward, but was too near to turn without coming upon the track, and a violent collision occurred, throwing him to the ground and causing him injuries. There was evidence that the speed of the car was from 8 to 25 miles an hour, and did not at all diminish up to the time of collision, although the motorman claims to have immediately, upon seeing the hose cart, attempted to stop his car. By a special verdict the jury found that at and prior to the collision the car was running at a greater speed than was consistent with ordinary care, which was the proximate cause of the injury, and that the defendant was guilty of want of ordinary care, which was the proximate cause of the injury; that the hose cart was not being driven at a negligent speed; and that the plaintiff was guilty of no want of ordinary care which contributed to the injury; and that the damages were \$4,000. Defendant moved for direction of a verdict, and after verdict moved to strike out and reverse the answers to the questions inquiring as to the negligent speed of the hose cart and the negligence of the plaintiff, and for judgment in its favor upon such amended verdict. Defendant also moved for a new trial. All of said motions were overruled, and judgment for the plaintiff entered, from which the defendant appeals.

Spooner & Rosecrantz, for appellant.

Dorr & Gregory, for respondent.

DODGE, J. (after stating the facts). The finding that the defendant's servant negligently operated its car is not seriously controverted. In its support there was evidence of extraordinary speed—20 to 25 miles per hour—and that nothing was done to check that speed till within some 20 feet of collision, although the plaintiff's team was in plain sight when the car was 100 feet from the crossing, and although his gong had been regularly sounded for several blocks. Indeed, it is inferable that the motorman neglected to keep any lookout ahead during a run of some 80 feet of approach to the crossing, for he failed to see plaintiff's team and vehicle until close to them. The chief contention is that plaintiff's conduct, as conceded or conclusively established, constituted contributory negligence.

The primary question argued is whether facts and circumstances surrounding the plaintiff at the time of and just before his injuries varied so radically from those surrounding the ordinary traveler that what would have been negligence in the latter per se as matter of law might by reasonable minds be deemed consistent with the care to be expected of the ordinarily prudent man under such circumstances as are shown in this record. That the same acts may be either careful or negligent according to the variant circumstances is ele-

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mentary. *Boelter v. Ross Lbr. Co.*, 103 Wis. 324, 330, 79 N. W. 243; *Warden v. Miller*, 112 Wis. 67, 87 N. W. 828; *Yerkes v. No. Pac. Ry.*, 112 Wis. 184, 193, 88 N. W. 33, 88 Am. St. Rep. 961. This court, in common with many, if not most, others of last resort, has declared that certain acts are so obviously and notoriously variant from the conduct of persons of ordinary prudence at railway crossings under all ordinary circumstances that reasonable minds cannot honestly differ as to whether they are negligence; hence that they must be so held as matter of law. Among these are the omission to look and listen for an approaching car when the opportunity to do so exists; also the needless attempt to make the crossing ahead of the car or engine with knowledge of its approach in such proximity and at such speed as to make the attempt dangerous. *Koester v. C. & N. W. Ry.*, 106 Wis. 460, 465, 82 N. W. 295; *Tesch v. M. E. R. & L. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Watermolen v. Fox R., etc., Co.*, 110 Wis. 153, 156, 85 N. W. 663; *Stafford v. Chippewa Valley E. R. Co.*, 110 Wis. 331, 346, 85 N. W. 1036. In the last case it is declared negligence to attempt to cross when collision is probable, unless the speed of the car be greatly slackened. In this connection it is also settled in *Tesch v. M. E. R. & L. Co.*, 108 Wis. 608, 84 N. W. 823, 53 L. R. A. 618, that the ordinary traveler is not necessarily negligent if, calculating reasonably, he has time to cross safely without interfering with the movement of the car, assuming it is moving at a reasonable rate of speed or at the higher actual rate, is known to him. This conclusion was reached as a corollary of the proposition that, as between the general traveling public and the street car, the former have neither right to interrupt the latter's course to enable them to cross, nor reason to expect that the operator will so manage the car as to give them opportunity, for cars are not usually so managed, and cannot be consistently with the duty of rapid transportation which they serve. Another consideration, written into several of the above cases, which has been forceful in leading to conclusion of negligence from an attempt to make the crossing in a doubtful case, is the very slight measure of inconvenience to the ordinary traveler in pausing to give the car way, as compared with the peril of attempting the crossing.

In the light of the principles and rules of law thus established, let us consider whether the circumstances surrounding plaintiff were such that they might legally differentiate the situation from the ordinary one as to the conduct reasonably to be expected from the man of ordinary prudence. We must first eliminate one asserted element of conduct which is made the basis of much of appellant's argument in supporting both his claim for a directed verdict and certain requested instructions; that is, that plaintiff approached Vliet street at such speed, and with his horses so beyond control, that he could not have stopped to avoid collision,

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although the car had been on the crossing without negligence of the motorman. We do not find it necessary to decide whether such conduct would constitute negligence, for we find no proof of it. The evidence is without dispute that, although driving rapidly, with horses on a run, as his duty required, plaintiff still had them under perfect control, and had already checked them so that he might have stopped at the time when he sighted the car, 90 to 100 feet away, when he decided that he had sufficient time to cross ahead of it. Again, there was no failure of the duty to look, and no failure to see that which was physically apparent. At the moment that he reached the building line on the north side of Vliet street he looked, and saw this car. Hence the question is whether an irresistible and indubitable inference of negligence arises from the fact that he gave head to his horses, and attempted to make the crossing. Among those things which distinguish the conduct of the driver of fire apparatus from others is, primarily, the duty and necessity of great speed. The loss of moments may mean destruction of lives or property. The public purpose which such men and appliances serve would be defeated by the hesitation and caution which does and should characterize the ordinary traveler. To serve this public purpose, the driver must and does seize every opportunity to make expedition. He takes chances, in deference to the imperative necessity for speed, which would be wholly unjustifiable otherwise. These things firemen do. These things they must do. The conclusion seems irresistible, either that they are consistent with ordinary care under those circumstances, or that the ordinarily prudent man cannot hold a position in the fire department. Another distinguishing circumstance is the persistent alarm which precedes the fire vehicle. The clamor of its gong is a penetrating, far-reaching sound, so entirely distinct from the other sounds of a city street as to force attention at once. That circumstance, of course, greatly diminishes the hazard resulting from the speed, as it serves to clear the way of obstacles, and justifies a considerable measure of confidence that crossings and corners will be clear when reached. Another and most important distinction, certainly as applied to plaintiff's conduct, is the undisputed and uniform custom of the operators of street cars to give the fire vehicles right of way, and to slow down and stop to avoid collision. This is just what the ordinary traveler has no justification in expecting. His duty, as pointed out in the *Tesch and Stafford Cases*, is to govern his conduct upon the expectation that the car will continue at the speed at which it is traveling when he observes it. The ordinarily prudent man acts in the light of his experience of what is customary and usual. If the uniform custom were to hold cars back from a crossing to enable him to pass over, he would probably deem it safe to proceed when he believed

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his approach was seen by the motorman, and the car was enough away to permit the usual efforts to have effect. That is not usual, a contrary rule of conduct is and must be observed by the ordinarily prudent traveler. On the other hand, it is held to be consistent with due care for the motorman under such circumstances to approach crossings, even at a speed that he may be unable to advert collision with others, merely because he has a right, based on experience, to expect that travelers will not come in his way when his car is in sight and his gong sounded to warn them. We are of opinion that it is not beyond reason for a jury to conclude that the plaintiff, after having given warning of his approach by such clamor of his gong that it was heard by people shut in houses while he was still a block or more away, and when he drove out from Sixteenth street into plain sight of the motorman 90 feet away, might have believed reasonably that his presence was known, and might reasonably have expected that the usual and customary efforts to keep the car clear from collision would be made. If that had been done, there is no pretense but the wagon could have passed in safety; hence a decision to make the attempt would not have been unreasonable. In other words, we hold that, although there might have been negligence in law for a traveler under ordinary conditions, to have taken the chance of crossing in the face of a car in the proximity and at the speed of this one, under the circumstances surrounding plaintiff so differed that reasonable minds might consider the same attempt by him to be within the bounds of due care; hence that the question was properly for the jury.

Only four decided cases with reference to street-crossing collisions with fire department vehicles have been brought to our notice. Of these *Warren v. Mendenhall*, 77 Minn. 145, 101 N. W. 661, and *Decker v. Brooklyn Heights R. (Sup.)* 72 Vt. Supp. 229, hold squarely that the circumstances surrounding the drivers are marked by material distinctions from those around other travelers, and that what would be negligence per se in the latter may well be open to a contrary conclusion in the case of the former. They fully support our view as above stated. On the other hand are urged upon us the appellant *Greenwood v. Railway*, 124 Pa. 572, 17 Atl. 3 L. R. A. 44, 10 Am. St. Rep. 614, and *Garrity v. Railway*, 112 Mich. 369, 70 N. W. 1013, 37 L. R. A. 529. In the latter of these the collision was with a steam railway train, and, of course, neither could the fireman's gong give any warning, nor was there any custom, nor, indeed, possibility, that the train should be slowed down or stopped after the wagon was in sight. The court held that the mere necessity of speed was not sufficient to absolve the driver from a duty to look for an approaching train, when, as there, he had full practical opportunity to do so. In the Michigan case it was said to be against public policy, and therefore negligence

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sengers in his car. The court was clearly right in entering a nonsuit on the ground stated—that the plaintiff was negligent in attempting to cross Market street without looking again for a car. There are other grounds on which a nonsuit would be sustained, but we rest the affirmance of the judgment on this one, in order that there may be plain and distinct notice of the duty of motormen in this regard.

The judgment is affirmed.

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(*Superior Court of Delaware, New Castle, Feb. 17, 1903.*)

[55 Atl. Rep. 332.]

Streets—Use by Street Railways and Public.

The rights of a street railway and the public to use the streets of a city must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other.

Street Railways—Care Required to Avoid Collisions.

A street car company, in operating its cars in a street, must move them at a reasonable rate of speed, and reduce the speed or stop, if need be, when danger is imminent.

Same—Stop, Look, and Listen.

Persons using the streets of a city on which street cars are operated are required to use reasonable care to avoid collision by stopping, and, if need be, turning out and keeping off the tracks in the presence of danger.

Same—Same.*

A person attempting to cross a street railway track is bound to look for approaching cars in time, if possible, to avoid collision, and, if he does not look and does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence.

Same—Use of Street—Rights of Public and Company.

Though the right of a street railway within its lines to use the street is superior to that of other users of the street, the public, in the exercise of due care, are entitled to cross the tracks as well within the blocks as at street crossings, in which case both the traveler and the railway company are required to use care, commensurate with the danger, to prevent a collision.

Personal injuries—Damages—Elements.

A person injured by reason of a collision with a street railway car is entitled to recover for pain and suffering, loss of power to labor, in the past and in the future, resulting from the injuries, loss of time and necessary expense in procuring labor which but for his injuries he would have performed himself, and expenses for medicine and medical attendance.

Action by Jacob Wilman against the People's Railway Company for damages for personal injuries, also for injuries

*As to the duty to stop, look, and listen before crossing street railway tracks, see foot-note appended to *Beerman v. Union R. Co.* (R. I.), 5 R. R. R. 707, 28 Am. & Eng. R. Cas., N. S., 707; *Kernan v. Market St. Ry. Co.* (Cal.), 6 R. R. R. 471, 29 Am. & Eng. R. Cas., N. S., 471; *Wolf v. City & Suburban Ry. Co.* (Ore.), 7 R. R. R. 777, 30 Am. & Eng. R. Cas., N. S., 777; *Daum v. North Jersey St. Ry. Co.* (N. J.), 7 R. R. R. 814, 30 Am. & Eng. R. Cas., N. S., 814. See also, preceding case and foot-note.

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with the collision. No error was committed in refusing these requests.

Another instruction was requested to the effect that one approaching a street railroad track, and "having a reasonable opportunity to judge of the speed of an approaching car, is bound to know such speed, and cannot assume that it is running at a speed consistent with ordinary care and proceed upon that assumption." Assuming that this instruction correctly states an abstract rule of law applicable to ordinary circumstances, it would be highly misleading in a case of this sort, where there were additional circumstances naturally affecting the driver's conduct; most prominent among them the custom of operators of cars to change their speed, either by slowing up or stopping, in order to give opportunity for the fire vehicle to pass. The man who has a right, in the exercise of ordinary prudence, to assume that such efforts will be made and be effective, is not necessarily negligent because he attempts to pass in front of a car, although it would be likely to collide with him if it continued at its known speed. As is said in the *Tesch Case*, the ordinary traveler has no right, in the exercise of a reasonable prudence, to indulge such expectation; but the driver of a fire department vehicle has, if he has reason to believe that his presence is known to the motorman. This instruction is, however, erroneous and misleading in another respect. It requires of every man "having a reasonable opportunity to judge" that he judge correctly, and "know" the correct speed. This goes beyond any authority in this or other courts. He is obliged to know that which the ordinarily prudent and intelligent man would know under the circumstances. Having, as the court said, reasonable opportunity to judge, he must reach the conclusion of the ordinary man, and not the infallible one. These suggestions are especially applicable to one who gets but a glance of a car or train approaching him nearly head on, for he is not at all well situated to observe accurately the speed. He must observe what is perceptible, but beyond this the law does not charge him with knowledge.

Another request for instruction was to the effect that one approaching a car track "must, in the exercise of ordinary care, look and listen for an approaching car, and continue so to look and listen up to the last moment that such acts would be of any virtue in preventing a collision with a car." Conceding that this is a correct abstract rule, as in most of its language it is, yet it has no application to the present case, for the evidence establishes without controversy that the plaintiff did look and see and know all that could have been ascertained by the utmost vigilance. The instruction is, however, faulty, and faulty in a respect relevant to the situation here. It lacks the qualification that one must look and listen if he have oppor-

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stances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car, and the person in the management of the wagon, are bound to the reasonable use of their sight and hearing for the prevention of accident, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would use under like circumstances. What is due and proper care depends upon the facts in each case. A person approaching a railway track or attempting to cross it, whether at a street crossing or at any other point along the street upon which it is laid, is bound to avail himself of his knowledge of the fact that the track is laid in the street, and act accordingly. If he approaches the track, or attempts to cross it, he is bound to look for approaching cars in time, if possible, to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence. *Price v. Chas. Warner Co.*, supra.

It has been held by this court that the right of a street railway company, within its lines, is superior to that of other users of the street, and must not be unnecessarily interfered with or obstructed. *Maxwell v. Railway Co.*, 1 Marv. 199, 40 Atl. 945, and *Brown v. Railway Co.*, 1 Pennewill, 335, 40 Atl. 936. But, as was said in *Price v. Warner*, supra, "the broad assertion of the superior right of a railway company may be subject to abuse, and should not be understood as exempting it in any case from the exercise of due and proper care." The public, using due care, have the right, in vehicles or on foot, to cross railway tracks, as well within the blocks as at street crossings. The company and the traveler are required to use such reasonable care as the circumstances of the case demand, an increase of care on the part of both being required where there is an increase of danger.

Even though the defendant company may have been negligent upon its part, yet if the negligence of the plaintiff contributed or entered into the accident, at the time of the injuries complained of, your verdict should be for the defendant, as the plaintiff in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party. If the injuries to the person and property of the plaintiff were occasioned by the negligence of the defendant company, or of its servants or agents, or any of them, and without the fault and negligence of the plaintiff, then your verdict should be for the plaintiff. If your verdict should be for the plaintiff, it should be for such sum as will reasonably compensate him for the injuries to his property and his person. For this purpose, you should take into consideration the plaintiff's pain and suffering, and his loss of power to perform labor, in the past and in the future, which may be found by you to be

we cannot concur with the appellant's criticism. That the right to make such assumption exists certainly has support from *Watermolen v. Fox R. E. R. Co.*, 110 Wis., at page 159, 85 N. W. 663, *Stafford v. Chippewa Valley E. R. Co.*, 110 Wis., at page 361, 85 N. W. 1036, and other cases which declare that the motorman of a street car has a right to assume that persons approaching a street crossing will exercise the usual and customary precautions, and may operate his car accordingly without guilt of negligence.

Error is assigned upon permitting a witness to testify that, sitting on a sidewalk, he had frequently heard the gong of the fire patrol wagon, which was described as similar to the gong on the plaintiff's wagon, at a distance of two blocks. The complaint seems to be that the conditions surrounding the witness were not identical with those surrounding the motorman. This, of course, is true, but we do not think it rendered the evidence inadmissible. It was a circumstance bearing upon its weight. The record is full of testimony, given without objection, from witnesses who heard the gong of this vehicle at varying distances and under varying circumstances of opportunity. It would be far too restrictive a rule that, in order to give the jury benefit of experience as to the effect of such gongs in giving distant warning, the witness must have been in exactly the same situation as the person claimed to have been warned on the particular occasion. All of the circumstances surrounding each witness being before the jury, the inference as to the efficacy of the sound became a question of fact for them to resolve as reasonably intelligent men.

Further error is assigned upon permitting cross-examination of the motorman as to whether the car in question was not a specially rapid one; he finally stating that, while not the most rapid, there were only two others which excelled it. The situation at the time this testimony was taken was that several witnesses had described the speed of the car at varying rates up to 25 miles an hour. The motorman himself had testified that he had his power lever thrown open to the second highest notch; that the ninth notch was the ultimate speed of the car, and that he had it at the eighth notch. In this situation, the ability of the car to make great speed was certainly a legitimate fact to be drawn out in testing the accuracy of this same witness, who had claimed that his speed was only seven or eight miles per hour. No error was committed in permitting him to be so cross-examined.

The damages are assailed as excessive, and in that connection complaint is made of an instruction which permitted the jury to consider plaintiff's loss of earning capacity for the future. The plaintiff was 37 years old, had been in the fire department some 9 years, and attained the rank of captain, with a salary of \$100 per month. The injuries suffered were a permanently loosened and enfeebled knee joint, the crush-

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ing in of the chest, ribs being broken both in front and rear and penetrating not only the outer membrane, but the pericardium itself, leaving adhesions between these membranes which the physicians declared were certain to be permanent, and to interfere seriously with any violent exertions, while suffering might not be great in the case of moderate exertions. His expenses of cure had been about \$500. His sufferings had been great, and had continued in some degree up to the time of the trial, two years after the injury. He still occupied his place in the fire department, but found it extremely difficult by reason of his injuries, to perform certain of the work necessary in fighting fires. In this situation it is impossible to say that there was no evidence from which the jury might have found his earning capacity was impaired. His profession, in which he had attained high standing and high compensation, called for extreme physical vigor. He could not hope to progress, nor, probably, to retain his then position permanently, with the impairment which the evidence tended to disclose. At least the jury might legitimately have drawn such inference. Of course, they had the advantage of opportunity to observe the man himself upon the stand before them. In view of all these considerations, we feel unable to say that the damages exceed what the jury might have believed proper compensation for all the injuries suffered, without passion or prejudice, and cannot, therefore, hold that error was committed by the trial court in ordering judgment for the amount so found.

We find no error which should reverse the judgment. Judgment affirmed.

STANLEY v. CEDAR RAPIDS & M. C. Ry. Co.

(*Supreme Court of Iowa, Feb. 7, 1903.*)

[93 N. W. Rep. 489.]

Negligence—Pleadings—Instructions.

Where in an action for injuries some of the grounds of negligence stated in the petition were withdrawn from the jury, an instruction, requiring the jury to confine itself to the acts of negligence "set out in plaintiff's petition," and that the plaintiff must prove negligence "as set forth in his petition," was properly refused.

Instructions.

A requested instruction that the jury was "at liberty" to consider the opportunity of the witnesses for seeing, their interest, their demeanor, etc., was not strictly correct, since, if the instruction was required, it should have made such consideration the "duty" of the jury.

Same.

Where a jury is instructed that a preponderance of the evidence is not necessarily established by the greater number of witnesses, and that it is the jury's duty to disregard testimony which does not seem reasonably worthy of credence, it is not an abuse of the court's discretion in the matter to refuse to charge that they should consider the opportunity of the witnesses for seeing, their interest in the case, and demeanor on the stand.

Stanley v. Cedar Rapids, etc., Ry. Co**Accident on Street Railway Track—Look and Listen—Instruction.**

In an action against a street railway for injuries sustained in a collision between plaintiff's carriage and a car, a requested instruction that plaintiff was guilty of contributory negligence if he could have seen or heard the car by looking or listening in time to have avoided the accident was erroneous, as imputing negligence in case by any possibility plaintiff might have so discovered the car.

Same—Same—Care Required.*

Ordinary care to discover an approaching street car by looking or listening is all that is required of a driver.

Issues.

Where the only issues to be submitted to a jury were as to the negligence of a street car company in running its car at an excessive speed, and in failing to sound its gong, and as to the contributory negligence of plaintiff, an instruction relating to the right of the motorman to assume that plaintiff would get out of the way was properly refused.

Instructions.

In an action by a driver for injuries sustained in a collision with a street car, a requested instruction that plaintiff could not recover if the accident occurred as the result of his failure to exercise ordinary care in driving on the track was covered by instructions that the driver was bound to take reasonable precaution to avoid collision with the car, and that a failure to exercise reasonable care, resulting in the accident, would defeat his recovery.

Accident on Street Railway Track—Signals—Positive and Negative Testimony.†

Where witnesses who deny the ringing of a street car gong were in as good position to hear as those who affirm it, no presumption arises in favor of the ringing of the gong.

Same—Negligence—Speed.

In an action for injuries sustained in a collision with a street car, caused by its alleged excessive speed, the rate of speed, in the absence of municipal regulations, was for the jury to consider in connection with surrounding circumstances, in order to determine whether it was negligent, and an instruction which, as a matter of law, eliminated the question of speed, was properly refused, unless it was so great as to imply a disregard for the safety of those approaching the track in an ordinarily careful manner.

Same—Same—Same—Instruction.

In an action by a driver for injuries sustained in a collision with a street car, an instruction that if the jury find "that by reason" of running the car at an unreasonable rate of speed it collided with plaintiff's vehicle, so as to injure him, then, etc., sufficiently instructs that the rate of speed must have been the proximate cause of the injury.

Same—Instruction.

Another instruction read that if the jury "found plaintiff's injuries, if any, were directly and proximately caused by the negligence, if any, of the defendants," then, etc.: *held*, that any omission in the first instruction was cured when taken in connection with the second.

Damages—Future Pain and Suffering—Loss of Time.

Future pain and suffering and loss of time constitute a proper element of damage for injuries received in a street car accident.

Same—Instructions.

In an action by a driver for injuries received in a collision with a

*As to whether the stop, look, and listen rule is applicable to street railway crossings, see preceding case and foot-note.

†As to the comparative weight of positive and negative testimony in regard to whether crossing signals were given, see foot-note appended to *Frank v. Pennsylvania R. Co.* (N. J.), ante, 375.

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street car, an instruction authorizing damages in such sum as will reasonably compensate him for the pain, loss of time, etc., sustained by reason of the accident, is not erroneous for failing to specify that the jury's findings on such matters must be based on the evidence.

Contributory Negligence.

One driving at a slow trot on a busy city street, as he approached a cross-street on which ran a street car line, listened for the car, but heard nothing. It was raining, and other rapidly driven vehicles were close beside him. As he reached a point at the corner where the buildings permitted him to look up the cross-street 50 or 60 feet, he did so, and, seeing no car, looked down the street for cars from that direction. On turning again to look up street, just as the horse got on the track, he saw a car only about 10 feet away, and tried to whip up his horse so as to escape, but was injured: *held*, that the facts negated contributory negligence.

Appeal from superior court of Cedar Rapids; J. H. Rothrock, Judge.

Action to recover damages for personal injuries received by plaintiff in a collision with a street car upon a street in the city of Cedar Rapids. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Steele and Powell, Harman & Powell, for appellant.
Rickel, Crocker & Tourtellot, for appellee.

DEEMER, J. While attempting to cross a street at the intersection of Third avenue and Second street west in the city of Cedar Rapids in a buggy in which he was riding, plaintiff was struck by a street car being operated on defendant's line of road, and received the injuries of which he complains. The grounds of negligence on which the case was submitted to the jury were: (1) Running the car at a high, unreasonable, and dangerous rate of speed, and (2) failure to ring the gong or to give other signals to warn plaintiff of the approach of the car in time to avoid the collision. Complaint is made of the court's refusal to give certain instructions asked, of certain of these given by the court on its own motion, and of the denial of defendant's motion for a new trial, based on the ground that plaintiff was guilty of contributory negligence. Of these in the order stated.

Instruction 1 asked by defendant reads as follows:

"(1) The basis of this action is the alleged negligence of the defendant in the operation of one of its cars in some of the particulars set out in plaintiff's petition, and in your deliberations you will confine yourselves to a consideration of the particular acts of negligence set out in plaintiff's petition. Negligence, in law, is defined as doing that which a person of ordinary prudence would not do under similar circumstances, or failure to do that which a person of ordinary prudence would do under the same or similar circumstances.

"Before the plaintiff can recover in this action, he must show by a preponderance of the testimony two things: First that the defendant was guilty of some act of negligence as

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defined above, and as set forth in his petition, which caused the injuries complained of; and, second, that he himself did no negligent act which contributed to such injuries.

"By a preponderance of testimony is meant the greater weight or value of the testimony, and not necessarily the greater number of witnesses. In determining the question of preponderance of the testimony, you will be at liberty to consider the opportunity the several witnesses who have testified had to see and understand the things about which they testified, and interest or lack of interest in the event of this suit, and the actions and demeanor of the several witnesses while on the witness stand." Failure to give the last paragraph of the request is assigned as error. In lieu thereof the court instructed as follows: "(7) You are the judges of the facts. The burden of the proof is upon the plaintiff to establish the material allegations of his petition by a fair preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the evidence, which does not necessarily mean the greater number of witnesses. (8) You are the judges of the credibility of the witnesses. You have the right, and it is your duty, not to consider such testimony as does not appear to you, as reasonable men, to be worthy of credence."

Taken as a whole, the instruction asked by defendant was erroneous, as applied to the facts of the case. There were four grounds of negligence stated in the petition, but two of which the court found were sustained by sufficient testimony to take them to the jury. Moreover, that part relating to the preponderance of the evidence was not strictly correct. As it reads, it would have no particular significance to a jury, for it merely gives it license to consider certain matters; whereas, if any instruction on the subject was demanded, it should have told them not only that they were at liberty to consider these things, but that it was their duty to do so. But, in any event, in view of the instructions given, there was no error in denying this request. The proposition involved related simply to matters to be considered in weighing evidence. These would occur to every sensible and reasonable man without any instruction, and courts may well assume that jurors are possessed of enough intelligence to understand these truths without having their attention specifically called to them. The giving of such instruction was largely discretionary with the trial court in any event, and no abuse of that discretion is shown. *Taylor v. Railway Co.*, 76 Iowa, 757, 40 N. W. 84; *Doran v. Railroad Co. (Iowa)* 90 N. W. 816, 3 R. R. R. 929, 26 Am. & Eng. R. Cas., N. S., 929; *State v. Viers*, 82 Iowa, 399, 48 N. W. 732; *Upton v. Paxton*, 72 Iowa, 300, 33 N. W. 773; *Bever v. Spangler*, 93 Iowa, 610, 61 N. W. 1072.

2. The second, third, and fourth instructions asked by defendant read as follows: "(2) If you find from the evi-

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dence that the plaintiff, before attempting to cross the street railway track at the time of the injury, could, by looking, have seen the car in time to have avoided the accident, but failed to look, or by listening could have heard the car in time to have avoided the accident, but failed to listen, and you further find from the evidence that the injury was the proximate result of his failure to either look or listen, then he was guilty of negligence contributory to his injury, and he cannot recover in this action. (3) The evidence shows without conflict that the plaintiff has frequently crossed the street railway at the place of the injury prior to the accident, and it further shows that he was thoroughly familiar with the location of such track, and knew that electric cars were operated at the crossing where the injury happened. Under such circumstances the plaintiff was required to exercise a higher degree of caution and watchfulness than if he had not possessed the knowledge above referred to. If you find that the motorman failed to sound a gong or ring the bell as he approached the place where the accident happened, that fact alone will not entitle plaintiff to recover in this action. The plaintiff, in approaching the street car track, was required to use the sense of sight as well as that of hearing; and, if he failed to exercise either the sense of sight or hearing, and he was injured in consequence of such failure, then such failure constituted contributory negligence, and he cannot recover in this action. (4) The motorman operating the car had the right to rely upon the presumption that the plaintiff approaching the railway crossing would exercise the caution of an ordinary prudent person, and that he would not enter upon the track without looking and listening to ascertain whether or not there was a car approaching; and if you find that as plaintiff approached the track with his horse he did not exercise that degree of caution and watchfulness which an ordinary prudent person would under similar circumstances, and the accident occurred as a result of plaintiff's failure to exercise ordinary care, then your verdict will be for the defendant." In lieu thereof the court gave the following: "(6) If you find from the evidence that the plaintiff's injuries, if any, were directly and proximately caused by the negligence, if any, of the defendant, as explained to you in the second and third instructions, then it is your duty to ascertain and determine whether the plaintiff was himself, at and previous to the time of receiving his injuries, if any, exercising such ordinary care as a man of reasonable caution and prudence would have exercised under like circumstances; and, if you find that his failure so to do directly contributed to his injuries, if any, then your verdict should be for the defendant; and upon the issue of the exercise of ordinary care by the plaintiff the burden of proof is upon him to establish the same to your satisfaction by a fair preponderance of the evidence." The second instruction asked is wrong, in that it

omits the feature of ordinary care. It required a verdict for defendant if plaintiff could, by the highest degree of care, or even, without reference to care, if he could by any possibility have seen the car in time to have avoided the accident. Ordinary care to discover the car by looking and listening is all that was required of him under the law. *Haines v. Railroad Co.*, 41 Iowa, 231; *Moore v. Railroad Co.*, 102 Iowa, 597, 71 N. W. 569. It will hardly be contended that plaintiff was required to use more than ordinary care to discover the car. He had the right to rely on the usual and ordinary signals being given by the defendant's employees in operating the car; and, while he was bound to use his senses of sight and hearing, he was not bound as a matter of law to know all that could have been discovered by the highest degree of prudence and caution. The third was erroneous in that it required a higher degree of care and caution on plaintiff's part than the law exacts. The standard of care on the part of one injured by another is always the same, to wit, ordinary care and prudence. What might be such care under some circumstances might not, it is true, be the same as under others; but the standard is fixed and certain. Whether or not he used it in the particular case is ordinarily for the jury, and must, of necessity, depend upon circumstances. *Orr v. Railway Co.*, 94 Iowa, 426, 62 N. W. 851; *Beem v. Light Co.*, 104 Iowa, 568, 73 N. W. 1045, 10 Am. & Eng. R. Cas., N. S., 610; *Robins v. Railway Co.*, 165 Mass. 30, 42 N. E. 334, 23 Am. & Eng. R. Cas., N. S., 483; *Consolidated Co. v. Scott*, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122, 58 N. J. Law, 701, 4 Am. & Eng. R. Cas., N. S., 371; *Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; *Railway Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; *Shea v. Railway Co. (Minn.)* 52 N. W. 902, 5 Am. & Eng. R. Cas., N. S., 695. There was evidence tending to show that plaintiff both looked and listened before attempting to cross defendant's track. The fourth instruction asked related more particularly to the question of the defendant's negligence and of the right of the motorman to assume that plaintiff would get out of the way. As applied to the exact questions submitted to the jury, it would have been out of place, if not erroneous. The matter, in so far as material, was covered by the fifth paragraph of the court's charge, which reads as follows: "Neither the defendant, for the operation of its cars, nor the plaintiff for crossing the street, had the exclusive right to the use of Third avenue at its intersection with Second street west. Neither had a superior right over the other, and each would be obliged, in so far as the undertaking in which each was engaged, and the car or vehicle each was using, would reasonably permit, to take reasonable precaution to avoid collision each with the other." In view of the two instructions given by the trial court which

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have already been quoted, we think there was no error in denying any of the requests.

3. The defendant also asked the following: “(6) In considering the testimony of equally credible witnesses touching the question of the ringing of the gong, you are instructed that positive testimony, tending to show that the motorman in charge of the car rang the gong, is entitled to more weight than the negative testimony tending to show that the witnesses testifying did not hear the gong ring. Therefore if you find the testimony upon this point is of equal weight or value, it will be your duty to find that the gong was ringing.” As applied to the facts shown in the record, there was no error in denying this request. The witnesses who gave the so-called negative evidence, or some of them, were in as good position to hear sounds and signals as those who testified that they heard. In such a case it would have been error to have given the instructions asked. *Spaulding v. Railway Co.*, 98 Iowa, 205, 67 N. W. 227; *Lee v. Railway Co.*, 80 Iowa, 174, 45 N. W. 739, 45 Am. & Eng. R. Cas. 157; *Mackerall v. Railroad Co.*, 111 Iowa, 549, 82 N. W. 975, 19 Am. & Eng. R. Cas., N. S., 59. The evidence adduced by plaintiff was not negative, but positive. *Doran v. Railroad Co.* (Iowa) 90 N. W. 816, 3 R. R. R. 929, 26 Am. & Eng. R. Cas., N. S., 929.

4. The eighth instruction asked by defendant was to the effect that the speed of the car was immaterial, unless the jury found such rate of speed was so high that proper regard was not had for the safety of persons who, in the exercise of ordinary care, might approach the track for the purpose of going upon or crossing the same. The one given by the court in lieu thereof read: “If you find from the evidence that on or about the 3d day of May, 1899, the defendant, by its servants and employees, was running a car operated by electricity along Second street west approaching Third avenue west, in the city of Cedar Rapids, Iowa, at a high and unreasonable rate of speed, and you farther find that by reason of running said car at a high and unreasonable rate of speed said car collided at or near the intersection of the street and avenue aforesaid with the vehicle in which the plaintiff was then riding, with such force and violence as to cause the plaintiff to sustain personal injury, then your verdict should be for the plaintiff, unless you find that the plaintiff, by his failure to exercise ordinary care and prudence directly contributed to such injury.” This second instruction is also challenged for the reason that it omits the thought that the high rate of speed must have been the proximate cause of the injury. The court made no other reference to the rate of speed question; and we have to determine—First, whether or not the instruction asked on this subject should have been given; and, second, whether or not the one given is correct. In the absence of statute or municipal ordinance, no rate of

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speed is negligent, as a matter of law. Whether the rate in a given instance was so great as to evince negligence on the part of the street railway company is generally a question of fact for the jury. It is manifest that no exact definition can be given of unreasonable and dangerous rate of speed. So much depends on the extent and character of the traffic on the street, and the surrounding facts and circumstances, that no exact rendering of the terms is possible. The rate of speed is to be considered by the jury with other circumstances in determining the question of negligence. *Artz v. Railroad Co.*, 44 Iowa, 284; *Latty v. Railway Co.*, 38 Iowa, 250.

Coming now to the second question involved in the point under consideration, to wit, failure of the court to instruct that the rate of speed must have been the proximate cause of the injury. It will be conceded, of course, that this is correct doctrine. That is to say, excessive rate of speed, even if shown, must have been the proximate cause of the injury. But it was not necessary for the court to use the term "proximate cause." When these words are used, courts generally find it necessary to explain them. They have a technical significance which is not always apparent to laymen, and, if other and more simple terms may be found, it is as well, if not better, to use them. The instruction given says, in effect, that the jury must not only find that the car was run at a high and unreasonable rate of speed, but by reason thereof it collided with the vehicle, and caused the injuries, and that the plaintiff did not by any negligence on his part contribute to the injuries. This is a short way of stating the doctrine of proximate cause. Aside from this, it appears that in the fourth instruction the court specifically called the jury's attention to the matter, and said that, "If it found plaintiff's injuries, if any, were directly and proximately caused by the negligence, if any, of defendant, as explained," etc. Taken together, there was no error in the instructions relating to this subject.

5. The sixth instruction given by the trial court reads in this wise: "If you find for the plaintiff, you should allow him such sum, not to exceed the amount claimed by him in his petition, as will reasonably compensate him for the pain and suffering, if any, or loss of time, if any, or both, suffered, or that will be suffered, by him because of his injuries, if any, by him sustained by reason of colliding with the car of the defendant at the intersection of Third avenue west and Second street west on or about the 3d day of May, 1899." This is challenged for two reasons: First, it is said it does not confine the jury to the evidence bearing on the question there submitted; and, second, it is argued that it leaves the jury to enter the realm of speculation as to future pain and suffering and loss of time. The second point is settled against defendant in *Westercamp v. Brooks* (Iowa) 88 N. W. 372; *Fry v. Railway Co.*, 45 Iowa, 416. The first point

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seems to us to be hypercritical. Jurors may be assumed to have some sense, and it is not presuming too much, we think, to say that every man who is fit to sit upon a panel knows that he is to make his findings from the evidence. Instructions must always be based on evidence, and when the jury is told that, if they find certain things, then such and such a result must follow, there is no reason for saying that such an instruction is misleading because the words "from the evidence" or "as shown by the evidence" are omitted. *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266; *Pennsylvania Co. v. Connell* (Ill.) 20 N. E. 89; *Dufour v. Railroad Co.*, 67 Cal. 324, 7 Pac. 769; *Railway Co. v. Falvey*, 104 Ind. 429, 3 N. E. 389, 4 N. E. 908; *City of Indianapolis v. Scott*, 72 Ind. 196; *Railway Co. v. Ingraham*, 77 Ill. 309. There are authorities to the contrary, of course, but we do not feel like following them. The reasoning used in their support is too refined for practical purposes. Each and every juror is sworn to render a true verdict according to the evidence and the instructions given by the court, and we may well assume that he remembers his obligation at all stages of the trial, without being reminded in every instruction, that he must find and believe from the evidence certain things in order to find for one party or the other.

6. Lastly, it is insisted that defendant's motion for a new trial should have been sustained for the reason that plaintiff not only failed to negative contributory negligence, but affirmatively showed that he was guilty of a want of ordinary care and prudence which directly contributed to his injury. The evidence on this point is conflicting. The jury was warranted in finding the following facts: Third avenue west is and was at the time of the accident one of the most traveled and busiest streets in the city, and from First street west to Second street it is, and was at that time, lined with business houses on either side, most of which were two stories in height, and which came up flush with the avenue line. In the easterly corners of the intersection of the avenue with Second street were buildings flush with the avenue line. One of these buildings is called "Watson's Store." The avenue was paved with brick. Immediately prior to the time plaintiff was injured he was driving at a slow trot west along Third avenue, and a little to the north of the center of the avenue. There was a heavy rain then falling, and a buggy was being driven rapidly in front of him and a wagon behind. Being thoroughly familiar with the location of defendant's track on Second street, and knowing the custom of defendant to sound the gong on its cars when approaching such crossing at a distance of 100 feet to 150 feet from the avenue, plaintiff commenced listening for the car at the alley, or about 150 feet from the tracks, and continued to listen for it as he drove along, but was unable to hear either the sound of the gong or rumble of the car. When he approached near enough to the

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cks so that 50 or 60 feet of the track to the north of avenue was exposed to his view, he looked to the north, seeing no car coming, he then looked to the south; and, satisfied himself that no car was coming from that on, he again looked to the north, and for the first time a car, which was then just over the north line of the avenue. At this time the front feet of his horses were on the rails, or about over the second or west rail. When the bell was first rung the car was probably 10 or 12 feet from the horse. Discovering his perilous position, and seeing the safest way out of it was to continue ahead, he reached for his whip, and attempted to get across the track, with the result that his buggy was struck near its center, and he was thrown out and injured. Had the jury found these facts to be true,—as we have no doubt it did,—the idea of contributory negligence is distinctly negatived, and it would have been error for the trial court to have granted a new trial on the ground contended for. See, as sustaining these conclusions, *Riley v. St. Railway Co.* (Minn.) 83 N. W. 376; *Harper v. Iowa*, 99 Iowa, 159, 68 N. W. 599, 5 Am. & Eng. R. & N. S., 697. The instructions given by the trial court were brief, and not as comprehensive, perhaps, as they should have been; but, taken together, they fairly presented the facts to the jury, and we find no error in denying the requests of the defendant.

Judgment is affirmed.

MEMPHIS ST. RY. CO. v. RIDDICK *et al.*

(Supreme Court of Tennessee, June 9, 1903.)

[75 S. W. Rep. 924.]

Railway—Injury to Person on Street—Failure to Look and Listen.

It is not negligence as a matter of law for a person driving on a street in a vehicle in the daytime, under ordinary circumstances, to fail to look and listen for the approach of street cars.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge. Separate actions by T. K. Riddick, Harriett Riddick, and M. Holloway against the Memphis Street Railway Company.

The actions were tried together, and, from judgment for plaintiff in each case, defendant brings error.

For appellant, Peters & Wright, for plaintiff in error.

For appellee, C. Ketchum and W. A. Percy, for defendants in error.

MR. JUSTICE L. J. SHORTLY. Shortly before the present suit was brought, the wagon of the defendant in error was run down, by a car

It is to be noted that whether the stop, look, and listen rule is applicable to street crossings, see preceding case and foot-note.

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of the plaintiff in error, on Beal street, in the city of Memphis, by reason of which occurrence the phaeton was broken, and Mr. Riddick's daughter, Miss Harriett, and his colored driver, William Holloway, were injured. Mr. Riddick brought suit for the breaking of his vehicle, and also for the expense of medical attention to his daughter, necessitated by the collision. Miss Harriett also brought suit for the injury she sustained. The colored driver also brought suit, and these three actions were tried together as one case in the court below and in this court. Verdicts were rendered in favor of each of the three plaintiffs in the court below, and judgments were entered thereon. No question was made here as to the amount of these judgments, the errors assigned being directed alone to the charge of the circuit judge.

Numerous objections were made to the charge, and all have been disposed of in a written memorandum filed with the record. In the present opinion, designed for publication, we need notice only one of these objections, and we do this in order to correct a misconception of one of the opinions of this court, which has been several times manifested during the present term. The objection referred to is as follows: During the course of his honor's charge, he used the following language: "While it is ordinarily the duty of a person traveling on the street in a vehicle to look and listen for the approach of cars, yet this is not an absolute rule of law; but it is for the jury to say, in view of all the proof, whether the plaintiff was guilty of contributory negligence in failing to look and listen." It is insisted that the circuit judge erred in giving this instruction, because it is said to be in conflict with our latest case upon the subject. *Nashville, etc., Ry. Co. v. Norman*, 108 Tenn. 324, 67 S. W. 479. The instruction was in accord with *Wilson v. Street Railway Co.*, 105 Tenn. 74, 83-85, 58 S. W. 334, and the cases therein cited, and with *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920, and *Saunders v. City & Suburban Railroad Co.*, 99 Tenn. 130, 41 S. W. 1031. It is insisted by counsel that a different rule is laid down in the *Norman Case*, but this is a mistaken view. It was not intended in that case to overrule any of the cases referred to, or to in any wise depart from or modify them. In the *Norman Case* there was evidence tending to show that Norman drove his wagon, at 11 o'clock at night, along Church street, in Nashville, into the crossing made by the intersection of Church street and Front street, at the foot of a heavy grade running northward from that point to the public square, and that at this point he was struck by a car, upon Front street, coming downgrade from the direction of the public square, and that before going upon this crossing he neither looked nor listened. In view of these facts, counsel for the railway company requested the circuit judge to give the following instruction to the jury, viz.: "It was the duty of the plaintiff to look and listen for

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the approach of the car before he attempted to pass over the track, and if you believe from the evidence that he failed to look and listen, and that such failure was the direct and proximate cause of the accident, or directly contributed to it as its approximate cause, your verdict should be for the defendant." The circuit judge declined to give this instruction to the jury, and this action of his was assigned as error in this court. In respect of this matter, this court, speaking through McAlister, J., said: "We are constrained to hold that the objection thus urged to the charge is well founded, and the court was in error in refusing this supplemental request to the effect that, if the plaintiff's negligence contributed proximately to the accident, this fact would defeat the right of recovery." In that case the court regarded the act of the plaintiff in driving at night with his wagon into a crossing at such a place as negligence *per se*—that is, under the special facts just stated—and held, in effect, that, if that negligence was the proximate cause of the plaintiff's injury, he could not recover. But this holding in no wise impeaches the rule announced in the case of *Wilson v. Street Railway Co.*, *supra*, and other cases referred to. It results that the foregoing assignment of error must be overruled.

For other errors, however, pointed out in the memorandum opinion, the judgment must be reversed, and the cause remanded for a new trial.

MILLS v. LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Sept. 29, 1903.*)

[76 S. W. Rep. 29.]

Fires—Origin—Evidence.*

In connection with other evidence to show that plaintiff's house was set on fire by an unknown passing engine, it may be shown that a few days before a fence as far from the track as the house took fire from sparks from a passing engine.

Instructions—Burden of Proof.

The court should not instruct on burden of proof, but simply frame the instructions so as to indicate on whom it lies.

Same—Spark Arresters—Degree of Care—Statute.†

Under Ky. St. 1899, § 782, requiring railroad companies to equip

*As to the admissibility of evidence of other fires set by defendant's locomotives, see foot-note appended to *Texas & Pac. Ry. Co. v. Watson* (U. S.), 7 R. R. R. 634, 30 Am. & Eng. R. Cas., N. S., 634; *Illinois Cent. R. Co. v. Scheible* (Ky.), 7 R. R. R. 100, 30 Am. & Eng. R. Cas., N. S., 100; *MacDonald v. New York, N. H. & H. R. Co.* (R. I.), 7 R. R. R. 792, 30 Am. & Eng. R. Cas., N. S., 792; note appended to *Texas & P. Ry. Co. v. Rutherford* (Tex. Civ. App.), 3 R. R. R. 334, 26 Am. & Eng. R. Cas., N. S., 334; *Abrams v. Seattle & M. Ry. Co.* (Wash.), 2 R. R. R. 465, 25 Am. & Eng. R. Cas., N. S., 465; *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C. A.), 2 R. R. R. 445, 25 Am. & Eng. R. Cas., N. S., 445.

†As to the degree of care required in furnishing spark arresters, see *Cratt v. Albemarle Timber Co.* (N. Car.), 7 R. R. R. 84, 30 Am. & Eng. R. Cas., N. S., 84 (negligence, sufficiency of evidence); *Cin-*

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locomotives with appliances that will prevent, as far as possible, sparks of fire escaping, it is not enough for them to put on safe and approved fire arresters, but they must provide the best and most effectual spark arrester known to science and of practical use, properly adjusted, that will prevent as far as possible sparks escaping.

Appeal from Circuit Court, Logan County.

"To be officially reported."

Action by F. B. Mills against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

S. R. Crewdson and W. P. Sandidge, for appellant.

Wilbur F. Browder, J. C. Browder, and Edward W. Hines, for appellee.

HOBSON, J. Appellant's residence was destroyed by fire in June, 1899, and he filed this action to recover damages therefor of the appellee on the ground that the fire originated from a spark emitted from one of its engines. On the trial of the case the jury returned a verdict in favor of the defendant, and the plaintiff appeals.

The track of the road as it passes appellant's house runs north and south. The house was situated on the east side of the track, and something over 50 yards from it. As shown by the plaintiff's evidence, there had been no fire in the front of the house for several months, and no fire in it at all on that day, except the kitchen fire to get breakfast, between 5 and 6 in the morning. The house was discovered afire in the roof over one of the front rooms facing the railroad about 10 o'clock. The kitchen fire had then been out several hours. The kitchen was at the back of the house. A strong wind was blowing from the west or from the railroad towards the house. The evidence for the plaintiff also showed that about 20 minutes before the fire was discovered a freight train passed going south, and that at this part of the road, being up grade going south, the engines puffed a good deal. There was also testimony to the effect that along this part of the track, and as far from it as the house was situated, a great many cinders were found on the ground, varying in size from a pea to the size of a man's thumb nail. At the time that the house was set on fire the fence, which ran along the railroad, took fire north of the house, and about one-eighth of

cinnati, N. O. & T. Pac. Ry. Co. v. Caskey (Ky.), 7 R. R. R. 533, 30 Am. & Eng. R. Cas., N. S., 583 (evidence that spark arrester was not properly adjusted); Missouri K. & T. Ry. Co. of Texas v. Carter (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.), 2 R. R. R. 445, 25 Am. & Eng. R. Cas., N. S., 445; note, 15 Am. & Eng. R. Cas., N. S., 510; Paris, M. & S. P. R. Co. v. Nesbitt (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 448; Farrington v. Rutland R. Co. (Vt.), 19 Am. & Eng. R. Cas., N. S., 248; Gumbel v. Illinois Cent. R. Co. (La.), 4 Am. & Eng. R. Cas., N. S., 452; Louisville & N. R. Co. v. Samuels (Ky.), 18 Am. & Eng. R. Cas., N. S., 374; Kimball v. Borden (Va.), 15 Am. & Eng. R. Cas., N. S., 519.

a mile from it, the fence being on the same side of the railroad as the house. The plaintiff offered to prove that a few days before the fire a fence in the field as far from the track as the house took fire from sparks from an engine that was passing. He also offered to prove that a few days before another fence was set on fire near the plaintiff's house by sparks emitted from a locomotive that was passing on the road. This evidence was excluded by the court, to which the plaintiff excepted. The court allowed the evidence to be given of fires occurring on the day that the house burned, but rejected the evidence as to other fires on other days, though about the same time. The propriety of this rule is the first question to be determined on the appeal.

In 2 Shearman & Redfield on Negligence, § 675, after stating that the plaintiff must show by reasonable affirmative evidence that the fire originated from the defendant's locomotive, the learned authors say: "Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the shed or building which actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury on this point. And, when the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before or after, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same cause." So, in 13 Am. & Eng. Ency. of Law (2d Ed.) 515, the rule is thus stated: "It has been held generally that, in an action for damages from fires alleged to have been caused by sparks from a locomotive, the plaintiff may introduce evidence to show that about the time the fire in question happened the engines of the defendant running past the location of the fire were in such a condition or were so managed as to be likely to set fire to objects in the position of the property burned, or, that sparks emitted by engines of the company about that time had set fire to other property similarly situated, and this without showing that these engines were run by the same engineer or were of the same construction as the one that occasioned the particular damage." The same rule is laid down in 2 Thompson, Negligence, §§ 2373, 2374, and was recognized and approved by this court in Kentucky Central R. R. Co. v. Barrow, 89 Ky. 643, 20 S. W. 166, where the court said: "The evidence introduced on the trial of which appellant complains was substantially that trains frequently set fire to the fences and grass at other places in the vicinity of appellee along the line of that road and at different times during the fall of 1881." The court, then, after quoting with approval from Sheldon v. Hudson River R. R., 14 N. Y. 218, a leading case announcing the rule above stated, said: "In our opinion

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the reasons given in the case referred to in favor of the competency of the evidence there considered apply to this case, and the evidence objected to was properly admitted by the court." This case was followed and approved in *L. & N. R. R. v. Samuel's Ex'rs* (Ky.) 57 S. W. 235, and *I. C. R. R. v. Scheible* (Ky.) 72 S. W. 325.

The locomotives of the defendant are under a unity of management. The screens used in all are the same. The proof for the defendant tended to show that they were all in substantially the same condition as to safety from sparks. The engine that passed just before the house was discovered afire could not be identified by the plaintiff. The fact that other fires occurred on property similarly situated set by these locomotives was a circumstance tending to show that the house, although so far from the track, might have been set afire in the same way. And the fact that other fires occurred tended to show either that there was some defect in the screens used by the defendant or in the management of the engines. We therefore conclude that the evidence rejected by the court should have been admitted.

Appellant also complains that the court erred in its instructions to the jury. The court gave three instructions. The first is not objected to. The second and third are as follows:

"(2) If plaintiff's dwelling house was set on fire otherwise than by sparks or coals of fire from defendant's engines, then the jury should find for the defendant. And if all defendant's engines passing plaintiff's premises at the time of the fire were equipped with safe and approved fire arresters, in good condition, and the trains were run and operated without negligence on the part of defendant's servants, then the jury should find for the defendant.

"(3) The court instructs the jury that if they shall believe from the evidence that defendant's locomotive engines which passed by plaintiff's premises on the morning of June 20, 1899, between the hour of 8 o'clock and the time his house caught fire, were equipped with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable, they must find for the defendant, even if they shall believe from the evidence that said fire was caused by sparks escaping from the engines, unless they shall further believe that the defendant's employees in charge of said engines operated them so negligently as to cause fire, and the burden is on the plaintiff to prove said engines were operated negligently and carelessly at said time and place.

"Negligence is the absence of ordinary care, and ordinary care is such care as an ordinarily prudent man would use under similar circumstances, involving his own interests."

The first clause of instruction 2 is not objected to. But it is hard to understand why the second clause of this instruction and instruction 3 were both given, as the same idea is

expressed in both. So much of the third instruction as told the jury that the burden was on the plaintiff to prove that the engines were operated negligently should not have been given, as the court should not instruct the jury upon the burden of proof, but simply to frame the instructions as to indicate on whom the burden of proof lies. And while this alone would not be sufficient grounds for reversal, it is better that such instructions should not be given.

It is insisted, also, for appellant, that the instructions do not follow the rule heretofore laid down, in so far as they exempted the defendant from liability if the engines were equipped "with safe and approved fire arresters, in good condition," as expressed in instruction 2, or "with suitable and approved fire arresters in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable," as expressed in instruction 3.

Section 782, Ky. St. 1899, is as follows: "All companies shall place in, on or around the tops of the chimneys of engines a screen fender damper or other appliances that will prevent as far as possible sparks of fire from escaping from such chimneys." In *Ky. Central R. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165, this court, after quoting the statute, said: "In some of the states railroad companies are by statute made absolutely liable for injuries caused by fire proceeding from their engines, irrespective of any question of negligence; but as such companies are in this state authorized by law to operate their railroads by steam, which necessitates the use of fire, they should not, on principle, in the absence of a statute requiring it, be held liable for injuries unavoidably produced by fire kept and used to generate steam; and that view is in harmony with the act just quoted, for persons and companies operating railroads are not required by that act to provide appliances that will effectually and certainly, under every condition, prevent the escape of sparks of fire from the chimneys of their locomotives and cars, but only to provide and use the best and most effectual preventative known to science, so as to prevent as far as possible injury being done in the mode described in the statute to property near railroads."

This case was approved in *L. & N. R. R. v. Taylor*, 92 Ky. 55, 17 S. W. 198, where it was said that the company is "only required to use the best and most effectual preventive known to science and of practical use that will prevent as far as possible sparks escaping from the chimneys of their locomotives." It was again followed in *L. & N. R. R. v. Dalton*, 102 Ky. 290, 43 S. W. 431, where it was held that the company was liable, though the spark arrester was in good condition, if the engine was handled negligently, and thereby sparks escaped from it and ignited the house. These cases were recently approved in *L. & N. R. R. v. Samuel's Ex'r* (Ky.) 57 S. W. 235, and *I. C. R. R. v. Scheible* (Ky.) 72

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S. W. 325. The construction of the statute thus so often announced should not now be departed from, and, in lieu of the last clause of instruction 2 and the whole of instruction 3, the court should have told the jury that if they believed from the evidence that the plaintiff's dwelling house was set on fire by sparks escaping from one of the defendant's engines, yet if they further believed from the evidence that said engine was at the time provided with the best and most effectual spark arrester known to science, and of practical use, properly adjusted, that would prevent, as far as possible, sparks escaping from the chimney of the engine, they should find for the defendant, unless they further believed from the evidence that said engine was operated negligently, and by reason thereof sparks escaped from it and set fire to the house. The definition of negligence should also be given as in instruction 3. While the evidence was conflicting on the whole case, we conclude that a new trial should be granted.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

ST. LOUIS, I. M. & S. RY. CO. v. LAWRENCE.

(*Court of Appeals of Indian Territory, Sept. 23, 1903.*)

[76 S. W. Rep. 254.]

Fires Set by Locomotives—Evidence—Other Fires.*

Where, in an action against a railroad company for the value of cotton destroyed by fire set out by one of its engines, the particular engine that set the fire was not identified, evidence that a few days after the fire in question a fire was set out in cotton on the same platform by an engine pulling one of defendant's trains was admissible.

Same—Presumption of Negligence.†

In an action for damages from fire set out by a locomotive, an instruction that if the evidence showed that the fire originated from sparks from a passing engine operated by defendant it was prima facie proof of negligence, and the burden of proof shifted to the rail-

*As to the admissibility of evidence of other fires set by defendant's locomotives, see preceding case and foot-note.

†See *Krejci v. Chicago & N. W. Ry. Co.* (Iowa), 3 R. R. R. 924, 26 Am. & Eng. R. Cas., N. S., 924; foot-note appended to *Raleigh Hosiery Co. v. Raleigh & G. R. Co.* (N. Car.), 5 R. R. R. 702, 28 Am. & Eng. R. Cas., N. S., 702; *Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), 5 R. R. R. 68, 28 Am. & Eng. R. Cas., N. S., 68; *Great Northern Ry. Co. v. Coats* (C. C. A.), 5 R. R. R. 50, 28 Am. & Eng. R. Cas., N. S., 50; *Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex.), 1 R. R. R. 831, 24 Am. & Eng. R. Cas., N. S., 831; *San Antonio & A. P. Ry. Co. v. Adams* (Tex.), 1 R. R. R. 878, 24 Am. & Eng. R. Cas., N. S., 878; *St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex.), 1 R. R. R. 874, 24 Am. & Eng. R. Cas., N. S., 874; note, 15 Am. & Eng. R. Cas., N. S., 515; *Patteson v. Chesapeake & O. R. Co.* (Va.), 6 Am. & Eng. R. Cas., N. S., 389; *Gainesville, J. & S. R. Co. v. Edmondson* (Ga.), 10 Am. & Eng. R. Cas., N. S., 154; *Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex.), 14 Am.

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road company to show that it was not guilty of negligence, was proper.

Same—Instructions.

Where the particular engine alleged to have set a fire was not identified, and the insufficiency of proof as to negligence with relation to two particular engines did not relieve defendant of responsibility, it was not error to refuse to charge that there was no evidence of negligence as to the construction or management of such particular engines.

Appeal from the United States Court for the Northern District of Indian Territory; before Justice Raymond, January 17, 1903.

Action by J. A. Lawrence against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action brought by appellee (plaintiff below) against the defendant railway company to recover damages for the negligent burning of 10 bales of cotton, caused by sparks emitted by one of its engines. The cotton had been placed by the plaintiff for shipment on defendant's platform at Ft. Gibson, Cherokee Nation. The complaint avers that the cotton was placed by him on the platform erected by the defendant for the purpose of receiving goods, including cotton, for shipment; that by direction of defendant's agent he had previously done the same thing; that on the 23d day of December, 1898, the cotton was burned through the negligence of defendant, in this: that the cotton was burned and destroyed by fire set out by one of the defendant's engines, being used and operated on its roadway, "which was not supplied with the best appliances for arresting sparks," and in operating the said engine negligently and carelessly. The answer denied every allegation of the complaint.

The proof, taken as a whole, showed that the cotton was placed for shipment on the platform of the defendant company, which platform was located about 20 feet from the center of the main track of the railway, and about 4 feet higher than the top of the rail; that the cotton was burned on the morning of the 23d of December, 1898. No bill of lading was executed, and the company had not accepted the cotton for shipment. Before daylight of the morning of the burning a freight train was seen passing, going west, and about 45 minutes thereafter another freight train was seen by the same witness, going east. Both passed the platform on which the cotton was located. The one going east was on an up grade, and, according to the statement of the witness,

& Eng. R. Cas., N. S., 82; McCullen v. Chicago & N. W. Ry. Co. (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 500; Alabama G. S. R. Co. v. Johnston (Ala.), 20 Am. & Eng. R. Cas., N. S., 909; Farrington v. Rutland R. Co. (Vt.), 19 Am. & Eng. R. Cas., N. S., 248; Alabama & V. Ry. Co. v. Barrett (Miss.), 20 Am. & Eng. R. Cas., N. S., 141; Alabama G. S. R. Co. v. Taylor (Ala.), 21 Am. & Eng. R. Cas., N. S., 135; Drake v. Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 141.

“was laboring very hard—working steam very hard—and throwing lots of fire.” A few minutes after this train (the east-bound one) had passed the cotton was discovered to be on fire, and 10 bales were destroyed. A few days after these occurrences, according to the same witness, other cotton on the same platform was set fire to by one of defendant's engines. He saw the fire come from the engine, fall upon the cotton, and set fire to it.

The defendant offered proof to show that from the time the first train was seen going west to the time the fire was discovered there were but two trains passed the platform, one going west, No. 269, pulled by engine No. 442, the other going east, train No. 276, engine 440; that after the arrival of the trains, one at Coffeyville, Kan., and the other at Van Buren, Ark., they were examined, and found in a perfect condition; that the spark arresters were in good condition and of the latest improved kind. The engineer and conductor on each train testified that the engines were carefully and properly handled while passing Ft. Gibson. The engineer of the east-bound train testified that his engine on that occasion while passing Ft. Gibson and the platform did not emit any sparks, and that at that time he had shut off the steam. The case was tried to a jury, and verdict for plaintiff. Motion for new trial was filed and overruled, and the cause duly appealed to this court.

Dodge & Johnson and Oscar L. Miles, for appellant.
William T. Hutchings, for appellee.

CLAYTON, J. (after stating the facts). In the assignment of errors there are five specifications of error, as follows: “(1) The court erred in overruling motion of defendant to direct the jury to return a verdict for defendant, which motion was offered at the conclusion of the testimony offered by and on behalf of the plaintiff. (2) The court erred in admitting the testimony of witness Blake as to the fire started on cotton platform a few days after the fire complained of here occurred. (3) The court erred in overruling the motion of the defendant to direct the jury to return a verdict for the defendant, which motion was interposed at the conclusion of all the testimony offered on behalf of both parties to this cause. (4) The court erred in giving of its own motion instruction No. 4. (5) The court erred in refusing to give instructions B and C, asked by defendant.”

The first and third specifications present the same issue, and will be hereafter considered.

Passing to the second specification, the objection is that the plaintiff's witness Blake was permitted to testify, over the objection of defendant, that “just a few days after this fire that burned Mr. Lawrence's cotton a fire was set out in the cotton on the cotton platform by the engine pulling local. It was broad daylight, and I saw the fire as it came out of the

engine and fell over on the cotton. Was right there when the fire started, and helped to put it out."

The rule upon this question is clearly stated, and supported by many authorities therein cited, in the case of Lesser Cotton Co. v. Railway Co., 114 Fed. 135, 52 C. C. A. 99. It is there stated: "The true rule upon this subject is that, in an action against a railway company for setting a fire by means of defects in the condition or operation of an engine, it is competent, where the engine that might have set out the fire is unknown or unidentified, to introduce testimony that some of the defendant's engines set fires or threw igniting sparks at other times, within a few weeks, and at other places in the vicinity. * * * But where the engine which alone could have caused the fire is identified, and its spark arrester is produced, testimony that other engines of the defendant at other times and places set fires or threw igniting sparks is neither competent nor relevant to the issue, without proof that they were in the same condition and operated in the same way as was the engine charged when the fire occurred." And therefore the whole question on this assignment is, was the engine that caused the fire, if it were caused by one at all, clearly identified by the proof?

The cotton was placed on the platform the day before the fire, and therefore must have been there during the night of the 22d. It was discovered to be burning about 3 o'clock of the morning of the 23d. The train dispatcher testified that for three hours preceding the time when the fire was discovered no trains except the two drawn by engines 440 and 442 had passed this place, which is as much as to say that three hours preceding the discovery of the fire another train had passed that place, and how many others before that during the night is not known. But during an interval of three hours three trains had passed. As to the first, no proof was made as to the condition of the engine, or as to its proper operation by the employees of the company. And conceding that if it were clearly shown by the proof that either engine 440 or 442, passing within three-quarters of an hour of each other, set out the fire in controversy, that this would be a sufficient identification of the engine to exclude the proof of other fires having been set out by other engines near the same time, we think it has not been clearly shown that either of these engines did it. It is true that the testimony of plaintiff's witness Blake strongly tends to show that it was one or the other of these engines. But the defendant, by its proof, showed a condition that it would have been almost, if not quite, impossible, if its witnesses are to be believed, that the fire was set out by either of those engines.

Mr. Wilson, the engineer on the west-bound train, engine No. 442, testified as follows: "I was employed by the St. Louis, Iron Mountain & Southern Railway Company during the month of December, 1898, and on the morning of Decem-

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ber 23, 1898, I was engineer on train 269, operating engine 442, pulling said train, and we arrived at Ft. Gibson, I. T., some time after two o'clock that morning, en route from Van Buren, Ark., to Coffeyville, Kan., and as we came up to the station from the east I shut off steam and rolled on past the depot, and about as I was passing the depot I looked back and got a signal from the conductor to stop. I rolled on down west, and stopped so that the caboose when the train stopped was about at the depot, or a little west of it. * * * I remember we rolled past the cotton platform without working any steam before the train stopped. I handled my engine at Ft. Gibson that morning in a careful and skillful manner, and there was not at any time anything in the operation of the engine that was improper, or otherwise than careful and skillful. * * * Q. Mr. Wilson, did your engine start any fire on that trip? A. No, sir. Q. Do you always handle your engine in a careful and skillful manner? A. Yes, sir; I believe I do. Q. Did you ever start any fires by the operation of an engine? A. No, sir."

Mr. Elliott, the engineer on the east-bound train, engine 440, testified: "On the morning of December 23, 1898, I was engineer of train first 276, in charge of Conductor L. H. Lamay, bound from Coffeyville, Kansas, to Van Buren, Arkansas. Said train was drawn by engine 440, and we arrived at Ft. Gibson, I. T., about 3:30 o'clock a. m. We met train 269 at Coretta, and came on over to Ft. Gibson, and took water at the tank, and came on up to the station at about eight miles per hour. I shut off steam between the west switch and the cotton-seed house, and did not use any steam until after we had passed the depot. At this time I noticed some cotton on the platform at Ft. Gibson, and I saw no evidence of fire thereabouts. My engine did not throw fire on that trip, and I had no reports about the engine needing repairs upon my arrival at Van Buren."

Mr. Brewer, the defendant's machinist, boiler maker, and inspector of locomotives, testified: "These spark arresters are made of perforated steel sheets, the sheets being one-eighth of an inch in thickness, and the perforations being one-eighth of an inch wide by an inch and a quarter long. These sheets are placed in the front end of the engine immediately in front of the boiler and below the smokestack. The sheet is placed at an angle of about 45 degrees. The steam exhaust from the cylinders of the engine opens below the perforated steel sheet, or the spark arrester, so that when the steam comes from the cylinder, being exhausted, it passes through the perforated steel sheet, or spark arrester, and then on out through the smokestack. This steam, coming through the steel sheet and smokestack with tremendous force, draws cinders and air from the fire box through the tubes or flues that extend through the boiler, and thus creates a draft."

It is the "tremendous force" of the draft caused by the

steam exhaust coming through the steel sheet and smokestack that causes the sparks to be emitted in dangerous quantities, and if both engines had their "steam shut off," and were simply "rolling by" the cotton, they did not set fire to it; hence, if the fire was not set out by one of these engines, it must have occurred from some other cause, or from some other engine. No other cause was intimated by the proof. Three hours before the discovery of the fire another engine of the defendant, not identified in any manner, had passed; and three days afterwards an engine of the company, not identified, in passing set fire to cotton located on the very same platform. The complaint does not attempt to name the particular engine, nor does the answer divulge it, which set out the fire. The plaintiff introduces proof tending to show that it was one of the two; the defendant shows positively that it was neither. Then what was it? Was it some other engine or some other cause? To determine the question as to whether it was some other engine, not identified, it was competent to show by the proof that three days afterwards another engine of the company had, at the same place, set fire to other cotton. And therefore the court did not err in admitting proof of that fact.

We will next consider the fourth and fifth specifications of error. The fourth instruction given by the court, to which exception is taken, is as follows: "If the evidence in this case shows that the fire originated from sparks of a passing engine operated by the defendant company, and its servants and agents, it is prima facie proof of negligence, and the burden of proof shifts on the railway company to show that it was not guilty of negligence."

In the case of Lesser Cotton Co. v. St. L., I. M. & S. R. Co., *supra*, the Circuit Court of Appeals for the Eighth Circuit say: "The burden of proof was upon the plaintiffs to establish the causal negligence of the defendant. When they proved, if they did, that the fire was caused by sparks emitted by the defendant's engine, that burden shifted to the defendant, and required it to establish, by a fair preponderance of evidence, that it had exercised reasonable care to provide the most effective mechanical contrivance in known practical use to prevent the burning of private property by the escape of fire from its engines;" and cite many authorities in support of their holding. The fourth instruction given by the court in this case is substantially in compliance with the rule laid down by that court.

The instructions requested by defendant, and refused by the court, to which exception is taken, are as follows:

"You are instructed that there is no evidence to sustain a finding that either engine was not equipped and in such condition as the law required."

"You are instructed that there is no negligence shown in the operation of either engine by defendant."

"You are instructed that there is no evidence to sustain a

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finding of any negligence in the equipment, maintenance, or operation of engine 442, west bound, and as to that engine your verdict must be for the defendant.”

Courts are not required, at the solicitation of either party, to select particular parts of the evidence, and charge the jury that they are insufficient to establish a certain fact, unless the proof of that fact was necessary to support the verdict, and in such case it would be the duty of the court to take the case from the jury by peremptory instruction. The insufficiency of proof as to the negligence of the defendant as to these two engines does not necessarily relieve it of responsibility, and therefore the court did not err in refusing to give the instructions.

As to the first and third specifications of error, that the court erred in overruling defendant's motion for peremptory instruction in its favor, it is only necessary to say that the motions were based on matters which have been heretofore decided adversely to the contention of appellant, and there was no error in refusing to take the case from the jury.

The judgment of the court below is therefore affirmed.

GILL, C. J., and TOWNSEND, J., concur.

DAILEY v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, Oct. 13, 1903.*)

[96 N. E. Rep. 778.]

Stock, Injuries to—Duty to Fence—Railroad Fence—Application of Statute.

A railway company built two fences on the north side of its track. The first fence, placed about a rod from the boundary of the right of way, was connected with a cattle guard at a street crossing, and was extended westward indefinitely. The second fence extended from the street forming the crossing along the boundary of the right of way westward for about 500 feet to a pasture, where it turned, and joined the first fence. At the pasture end of the lane thus formed was a gate opening into the pasture, while the street end of the lane was open: *held*, that the first fence was a railroad fence, within Code, § 2055, making a railroad company liable for killing stock by reason of its failure to properly fence its track.

Same—Same—Stock Running at Large—Application of Statute.

Live stock straying in the lane was stock running at large, within Code, § 2055, providing that any corporation operating a railway and failing to fence the same against live stock running at large shall be liable for the stock killed.

Same—Same—Negligence—Prima Facie Case.

In an action against a railway company for killing a mule it was shown that the mule had been kept in a pasture at the end of a lane formed by two fences built by a railway company on its right of way; that at the pasture end of the lane was a gate leading into the pasture, while at the other end of the lane was open at a street; that the day before the mule was killed it was in the pasture; that during the evening before it was killed it was seen in the lane; that it strayed from the lane on the track through a defective fence: *held* sufficient to establish a prima facie case of negligence on the part of

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the company, shifting the burden on it to show its freedom from negligence.

Same—Same—Same—Rebuttal.

In such a case it was not sufficient to negative the prima facie case of negligence to show that the mule was in a safe place the day before it was killed, or to indulge in the conjecture that some one opened the gate leading from the lane to the pasture, and thus allowed it to enter the lane, but the company must prove that the animal came through the gate.

Appeal from District Court, Kossuth County; A. D. Bailie, Judge.

Action to recover the value of a mule killed upon defendant's right of way by one of its passing trains. The opinion states the facts. Trial to a jury, and verdict and judgment for plaintiff. Defendant appeals. Affirmed.

J. C. Cook, H. Loomis, and Clarke & Cohenour, for appellant.

Thomas O'Connor and F. M. Curtiss, for appellee.

BISHOP, C. J. Defendant's line of road runs through the city of Algona nearly east and west. To the west from Thorington street, and connecting with a cattle guard on the west line of said street, the tracks are fenced on both sides. On the north side of the track there are two fences, the first extending west indefinitely, and the second extending for some 500 feet only, to what is referred to in the evidence as the "McCoy pasture." The first of such fences, which we will call the "south fence," connects with the cattle guard at Thorington street, and, as it runs east and west, is located about a rod south of the north line of defendant's right of way. The north fence is on the line of the right of way, and when it reaches the McCoy pasture it turns south, and is joined to the south fence. Thus a lane about a rod wide is formed, extending from the said street to said pasture. At the street end it is open, passage into it being wholly unobstructed. At the pasture end there is a gate, opening into the pasture field. Both fences were built by the defendant company, and whatever repairs have been made thereon were made by the employees of the company. The mule in question had been kept in said pasture, and was known to be therein the day before it was killed. During the evening before it was killed it was seen in the said lane. It is conceded that the south fence between the lane and the railway tracks had been out of repair for a long time, and there was evidence tending to prove that the mule in question strayed upon the tracks through such defective place in the fence, and that it came to its death by being struck by a passing train. It does not appear how, or at what time, the mule escaped from the McCoy pasture.

The liability of a railway company for stock killed by its trains is fixed by section 2055 of the Code. That section pro-

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vides, in substance, that any railway corporation failing to fence its railway against live stock running at large where the right to fence exists shall be liable to the owner of any stock killed by reason of the want of such fence, etc.; and a failure to repair upon notice, or within a reasonable time, is a failure to fence, within the meaning of the statute. *Aylesworth v. Railway*, 30 Iowa, 459; *Brentner v. Railway*, 58 Iowa, 625, 12 N. W. 615; *McCormick v. Railway*, 41 Iowa, 193. Stating it in general terms, the contention of the appellant is that it cannot be held liable in this case, for that, as to stock running in the McCoy pasture, it was under no obligation to maintain the fence bounding this lane on the south; and, further, that as to the particular animal in question there is no direct evidence tending to prove that it came into the lane from the east or open end thereof, and was not, therefore, stock running at large, within the meaning of the statute. Such contention was embodied in a motion to direct a verdict, which was overruled, and in requests for instructions which were refused. We think there was no error in the rulings thus complained of. In the first place, were it not for the fact that the east end of the lane was open and unobstructed, we should be wholly disposed to agree that there was no obligation on the part of the defendant company to keep up or maintain the south fence. In view of such opening, however, the south fence became and was the railway fence, and the existence of the north fence became an immaterial consideration. We may qualify this by saying that, inasmuch as the north fence was on the right of way line, stock shown to have escaped through the same, or through the gate at the end of the lane from the McCoy pasture, directly upon the right of way, no negligence upon the part of the company appearing, it might be urged with much force that no liability for damages should attach to the company. Saying this is no more than to say that if a railway company, for the convenience of an adjoining landowner, puts in a gate between its right of way and a field of such owner, it cannot be held liable for injury to stock occasioned by the careless use of such gate by such owner or others not persons in its employ. *Mears v. Railway*, 103 Iowa, 203, 72 N. W. 509. But such doctrine cannot be made applicable to the case as it is made in the record before us. The lane in question was an open way, and stock straying thereon would be stock running at large, within the meaning of the statute. Now, the record does not answer the questions as to the time when and the place where the mule escaped from the pasture. It is certain enough that it was in there the day before it was killed, but it is also to be said that no one saw the gate open, and no one found any breaks in the fence of the McCoy pasture. But, with these facts before us, the questions still remain unanswered. The situation may be summed up by saying that we have simply the case of a mule running at large to-day

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that was within an apparently safe inclosure yesterday. This being true, and the mule having gone from an open way through a defective fence, and upon the tracks of the railway, where it was injured, a prima facie case of negligence on the part of the company can be said to have been made out. Such being the circumstances, the burden was then shifted to the defendant, to show its freedom from negligence. This conclusion has support in the following cases: *Brentner v. Railway*, supra; *Small v. Railway*, 50 Iowa, 338. And, in our opinion, it is not sufficient, to negative the case of negligence thus established, to point out that the mule was in a safe place the day before, or to indulge in the conjecture that some one opened the gate, and allowed it to enter the lane. In reason, the defendant may well be held to expect that stock would find its way into the lane, and ordinarily it could make no difference whether stock found there came from an adjoining inclosure or from one a mile away. If the company relies upon the fact that in getting upon its right of way such stock came through a gate in a fence separating its right of way from an adjoining field, it must prove such fact. The court cannot indulge in a mere supposition to relieve it from the effect of a prima facie case of negligence made out against it.

We discover no error, and the judgment is affirmed.

ATKINSON *v.* CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Sept. 29, 1903.*)

[96 N. W. Rep. 529.]

Killing Stock—Failure to Shut Track Gate—Negligence—Question for Jury.

Whether a railroad section foreman charged with the duty of keeping the fence inclosing a railroad track in repair and the gates therein closed, who saw a gate therein open, and persons haying in an adjoining field, and knew that the persons had been accustomed to leave it open, and failed to close it that day, or return the following day and close it, was negligent, was for the jury.

Same—Same—Contributory Negligence.

Where a horse escaped from a pasture sufficiently fenced, and then passed on a railroad track through an open gate in the railroad fence, and was killed by a train, the owner's failure to close the gate a week before, on taking the horse to the pasture, was not negligence precluding a recovery.

Same—Same—Same.

There was no contributory causal connection between a person's failure to close a gate in a railroad fence and the fact that his horse, a week later, passed through it, and onto the track, where it was killed by a train, where the gate was closed several times during the interval.

Same—Same—Fence Law.

Under the statute making a railroad company absolutely liable for all damage to stock occasioned by its failure to maintain sufficient fences, a railroad company is liable for killing a horse which escaped

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from the owner's pasture, sufficiently fenced, and then entered on the company's track through a gate in the fence adjoining the land of a third person, and negligently left open by the company.

Appeal from Circuit Court, Brown County; Samuel D. Hastings, Jr., Judge.

Action by John Atkinson against the Chicago & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff lived some little distance south of the defendant's railway track, and owned an extensive pasture lying on the north side of the track, and somewhat to the westward of his residence. On August 18th he sent a hired man to put a horse into said pasture. They entered upon the right of way of the defendant, proceeded westward a distance, and found an open farm gate into the premises of a third person, through which the hired man took the horse, and proceeded from a quarter to half a mile further westward to the plaintiff's pasture and put the horse in, carefully repairing the pasture fence, so that there is no question as to the sufficiency thereof. He did not close the farm gate through which he passed. During the ensuing week the farm gate was frequently, if not continuously, open, and especially in the afternoon of the following Saturday, the 24th of August, it was observed to be open by the defendant's section foreman, whose duty it was to look after the condition of the fences. He noticed that haying was in progress near the gate, and did not close it, and did not see it again until the following Monday. Some time during Sunday, the 25th, the plaintiff's horse, having escaped from the pasture without negligence on plaintiff's part, entered upon the defendant's right of way through this open gate, and was killed. This action was to recover damages on the ground of negligence of the defendant in failing to maintain its fences. The jury found that the defendant's section foreman was guilty of negligence in not seeing that the gate in question was closed before the horse was killed, and that, with the knowledge he had, a man of ordinary intelligence and prudence, in his position, ought to have reasonably anticipated that the gate would be left open if he did not close it. Upon this verdict judgment for the plaintiff was entered, from which the defendant appeals.

Edward M. Hyzer, for appellant.

Sheridan & Evans, for respondent.

DODGE, J. (after stating the facts). 1. Refusal to direct verdict for defendant. Appellant's first contention in this connection is that there was no evidence of negligence on its part. It appeared that the section foreman charged with the duty of keeping the fence in repair and gates closed saw the gate open in the afternoon of Saturday, and people haying in the adjoining field, who, to his knowledge, had been accustomed to leave the gate open on their departure, so that

he had reason to believe they would do so on this occasion. He, however, went away, and neither that night nor the next day, during which the plaintiff's horse was killed, did he return. We are unable to say, as matter of law, that such neglect was the care to be expected from an ordinarily prudent person under the circumstances. The defect in its fence being thus brought to the notice of appellant, it owed the duty of due diligence in its repair. Section 1810, Rev. St. Wis. 1898; *Laude v. Railway*, 33 Wis. 640; *Curry v. Railway*, 43 Wis. 665; *Wickham v. Railway*, 95 Wis. 23, 26, 69 N. W. 982; *May v. Railway*, 102 Wis. 673, 79 N. W. 31; *Crossby v. Railway*, 58 Mich. 458, 25 N. W. 463; *Wabash R. Co. v. Perbex*, 57 Ill. App. 62; *Manwell v. Railway*, 89 Iowa, 708, 57 N. W. 441. What period of utter inaction was consistent with due diligence was a question of fact, involving consideration of many surrounding circumstances, and was properly one for the jury.

Appellant next contends that the evidence convicted plaintiff, or rather his hired man, of contributory negligence. The evidence designated as thus effective is that the hired man left this gate open as he found it when he went through on his way to the pasture and on his return. The jury have found that this occurred a week before the horse escaped, and the evidence is undisputed that the pasture was inclosed by an entirely safe and sufficient fence. We find difficulty in crediting counsel with seriousness in arguing that it is negligence per se for a farmer to leave a horse in a pasture inclosed by a good and sufficient fence because somewhere else a gate is open through which the horse might pass if once outside of the pasture. However, we cannot agree with the contention. Such conduct is too frequent with the mass of mankind to warrant us in so doing. Neither can we discover any contributory causal connection between leaving the gate open on August 18th and the passage of the horse through the same on the 25th, when, according to the testimony of appellant's sectionman, it was closed several times in the interval.

2. Error is assigned upon an instruction to the effect that, if the section foreman for the first time saw the gate open, but with a load of hay approaching it from the other side, he would have been justified in assuming that the person about to pass through would close the gate, and would have been under no obligation to pay any further attention; but, if he knew it would be left open, then the question arose for the jury whether he exercised the care of an ordinarily prudent man under like circumstances. We have already declared our view that under such circumstances the question did properly arise for decision by the jury, and the instruction assailed went no further than to so state, wherein was no error. Whether the preliminary statement that there would have been no negligence if the foreman had not known the gate

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would be left open is accurate, might be subject to question (*Wabash R. Co. v. Perbex*, 57 Ill. App. 62), but, if erroneous at all, the statement errs in favor of the appellant.

3. The remaining assignment of error is alleged upon the ordering of judgment upon the special verdict, because there is contained therein no finding of proximate cause. It is admitted that the horse entered upon the right of way by the open gate. It is said by Ryan, C. J., in *Curry v. Railway*, 43 Wis. 676, that, of course, the open gate does not cause the injury to the horse; but the statute does not require this as a condition of the liability; merely that the result shall be occasioned by the absence of or defect in the fence, and that the injury from a train suffered by an animal which enters by means of such opening is occasioned thereby. Neither does the statute limit the company's liability to cases where an ordinarily prudent person might have anticipated that animals would probably enter upon the right of way, but imposes absolute liability for any which do enter by reason either of failure to fence or of negligent failure to maintain fence, subject only to defense of contributory negligence in the latter case. The lawmakers have legislatively assumed the probability that animals will enter on a railroad which is fenced either inadequately or not at all, and dispensed with the necessity of a finding that an ordinarily prudent man would anticipate such event. The railway company is subjected to the duty of fencing not alone for the benefit of the adjoining owner, but of the public at large. 3 Elliott on R. R. § 1190; *Curry v. Railway*, 43 Wis. 684; *Herrell v. Railway*, 114 Wis. 605, 609, 90 N. W. 1071. The danger to be adverted, and which the statute assumes to be probable, is not only that to the adjoining owner's cattle lawfully on his premises, but to any others which may be there, either lawfully or as trespassers. *Curry v. Railway*, supra; *May v. Railway*, supra; *Herrell v. Railway*, supra. Hence the fact urged by appellant that the owners of the land adjoining this fence were not accustomed to pasture cattle there in no wise absolved the appellant from the liability imposed by the statute in case of negligent omission to maintain its fence. We are entirely satisfied that the verdict in this case found all the controverted facts necessary, in connection with those uncontroverted, to warrant the judgment in plaintiff's favor.

Judgment affirmed.

ATLANTA RY. & POWER CO. v. MONK.

(*Supreme Court of Georgia, Aug. 12, 1903.*)

[45 S. E. Rep. 494.]

Pleading—Amendment—Harmless Error.

Where, to an action of damages on account of personal injuries, an amendment was allowed, which alleged acts of negligence of an entirely different nature from those set up in the original petition, but

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in charging the jury the court gave instructions which expressly eliminated from consideration any acts of negligence charged in the amendment, and, in the light of the charge as a whole, the effect of the evidence introduced under the amendment must have been more advantageous than injurious to the defendant. the allowance of the amendment over the objection that it set up a new cause of action, whether originally erroneous or not, will not work a reversal of the judgment of the court below.

Evidence—Life Tables.*

The Carlisle Mortality and Annuity Tables are standard tables, and will be admitted in evidence without proof of their correctness, or that they are what they purport to be.

Accident on Track—Evidence—Warning to Public—Impeachment of Witness.

On the trial of an action against a street railroad company for damages on account of personal injuries received by the plaintiff while walking across a trestle, evidence that a person other than the plaintiff had been warned to keep the plaintiff and others off the trestle was, in the absence of anything to show that such warning was communicated to the plaintiff, or was given in her presence, inadmissible to bind her with notice that the general public was not allowed on the trestle, and, being irrelevant to any issue in the case, it was not admissible as foundation for an impeachment of the witness.

Same—Same—Method of Stopping Cars.

In such a case it is competent to show, by a witness proved to have been familiar with the operation of electric cars, the usual means of stopping such a car under given circumstances, regardless of the means of loading the car, the grade upon which it is running, or the speed at which it is run.

Same—Same—Same.

It is also competent in such a case to prove by expert testimony

*As to the admissibility of life tables as evidence, see generally, *Central of Georgia Ry. Co. v. Duffy* (Ga.), 6 R. R. R. 660, 29 Am. & Eng. R. Cas., N. S., 660; *Western & A. R. Co. v. Cox* (Ga.), 4 R. R. R. 923, 27 Am. & Eng. R. Cas., N. S., 923, and foot-note; *Chicago, R. I. & P. R. Co. v. Hambel* (Neb.), 2 R. R. R. 167, 25 Am. & Eng. R. Cas., N. S., 167; *Pearl v. Omaha & St. L. R. Co.* (Iowa), 1 R. R. R. 598, 24 Am. & Eng. R. Cas., N. S., 598; *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Tex.), 3 R. R. R. 608, 26 Am. & Eng. R. Cas., N. S., 608; *Haines v. Lake Shore & M. S. Ry. Co.* (Mich.), 1 R. R. R. 627, 24 Am. & Eng. R. Cas., N. S., 627; notes, 5 Am. & Eng. R. Cas., N. S., 361; 7 Am. & Eng. R. Cas., N. S., 166; 9 Am. & Eng. R. Cas., N. S., 846; 11 Am. & Eng. R. Cas., N. S., 539; 14 Am. & Eng. R. Cas., N. S., 435; 15 Am. & Eng. R. Cas., N. S., 793 (in actions for permanent injuries); *Kerrigan v. Pennsylvania R. Co.* (Pa.), 16 Am. & Eng. R. Cas., N. S., 835; *Crouse v. Chicago & N. W. Ry. Co.* (Wis.), 14 Am. & Eng. R. Cas., N. S., 780; *Atchison, T. & S. F. Ry. Co. v. Ryan* (Kan.), 21 Am. & Eng. R. Cas., N. S., 684; *Sax v. Detroit, etc., Ry. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 653; *Trott v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 391; *Alabama Mineral R. Co. v. Jones* (Ala.), 8 Am. & Eng. R. Cas., N. S., 383; *Macon, etc., R. Co. v. Moore* (Ga.), 5 Am. & Eng. R. Cas., N. S., 355; *Atchison, Topeka & Santa Fe R. Co. v. Hughes* (Kan.), 2 Am. & Eng. R. Cas., N. S., 248; *Arkansas Midland Ry. Co. v. Griffith* (Ark.), 9 Am. & Eng. R. Cas., N. S., 846; *Harrison v. Sutter St. Ry. Co.* (Cal.), 8 Am. & Eng. R. Cas., N. S., 200; *Louisville & N. R. Co. v. Kelly* (Ky.), 7 Am. & Eng. R. Cas., N. S., 166; *Camden & A. R. Co. v. Williams* (N. J.), 11 Am. & Eng. R. Cas., N. S., 600; *Savannah, F. & W. Ry. Co. v. Austin* (Ga.), 11 Am. & Eng. R. Cas., N. S., 539; *Florida Cent. & P. R. Co. v. Burney* (Ga.), 6 Am. & Eng. R. Cas., N. S., 543.

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within what distance a single car can be stopped on a given grade, though it appear that the train which caused the plaintiff's injuries was made up of three cars, and that the grade at the place where the injuries were received was not so steep as the one in the hypothetical question submitted to the witness.

Same—Same—Speed—Curves.

It is also admissible in such a case to show the general effect of curves upon the speed of a car, and this may be done by a witness who is an expert in the running of steam, but not of electric, railroads.

Instructions.

Where the charge of the court as given fully covers the points made in written requests to charge, it is not error to refuse to charge in the exact language requested.

Accident on Track—Negligence after Discovery of Peril.

The evidence warranted a finding that the employees of the defendant did not exercise ordinary care to avoid injuring the plaintiff after her presence and peril were discovered by them; and accordingly it was not error to refuse a new trial on the grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Anna Monk against the Atlanta Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Tye, for plaintiff in error.

Julius L. Brown and Arnold & Arnold, for defendant in error.

CANDLER, J. Mrs. Monk was run over by a car of the Atlanta Railway & Power Company, and received injuries which resulted in the loss of both her arms. At the time of her injuries she was employed as a dancer by the Canton Carnival Company, which had, for two weeks previously, been giving shows upon what was known as the "Midway," at an exposition or fair held at Exposition Park, just outside the city of Atlanta. The fair had just closed, and the Canton Carnival Company was preparing to move its effects and send its performers to another city. About half past 11 o'clock at night, Mrs. Monk, with her husband and other employees of the Canton Carnival Company, was at Exposition Park, where she intended to board the train which was to take her from the city. The party of which she was a member were in a part of the fair grounds somewhat distant from the place where the train was which they were to board, and it was their intention to ride to that place on a trolley car of the Atlanta Railway & Power Company, which ran over a spur track connecting with the track of the Southern Railway Company. This spur track ran over a trestle about 400 feet long, on the sides of which were placed planks which might be used by pedestrians as a footway. The stream of water which the trestle spanned was between Mrs. Monk's party and the train they wished to take. According to the plaintiff's evidence, the party waited at the end of the trestle for a

trolley car to take them to the train. A car passed them going in the opposite direction, towards the terminus of the spur track inside the fair grounds, and it was in evidence (though controverted by the defendant) that, as the car passed the plaintiff's party at the end of the trestle, it stopped to discharge a passenger, and that the motorman was notified to stop for the party on his return passage. The evidence is conflicting as to the length of time that elapsed before the car returned. At all events, the party had started to cross the trestle on foot, and were overtaken, and the plaintiff injured, before they had gotten halfway across. At the terminus the car had taken on two "trailers," one a baggage car and the other what was known as a "gondola car." The evidence is hopelessly conflicting as to the speed of the cars upon the trestle, the opportunity of the motorman to have seen the plaintiff in time to have avoided the injuries, and the efforts, if any, made by him to stop the cars after he discovered their presence upon the trestle. Several witnesses for the plaintiff, including the plaintiff herself, testified that he not only had ample opportunity to have seen her, but that he actually did see her, in time to stop his cars before striking her; that, as she realized her danger, she cried out pleadingly, "Stop, oh please stop!" and that he replied, "Go to hell!" and made no effort whatever to check the speed of the cars.

The plaintiff's suit, as originally brought, was a joint action against the Atlanta Railway & Power Company and the Southern Railway Company, but a nonsuit was granted as to the last-named defendant, and no exception was taken thereto. The original petition alleged that the employees of the street railroad company had warning of the plaintiff's presence on the trestle before the car went thereon; that the motorman in charge of the cars had ample opportunity to stop them, after discovering the plaintiff's danger, in time to have avoided injuring her, and that he was guilty of gross and wanton negligence in not doing so. It also alleged that the trestle had been constructed for the use of pedestrians; that cross-ties of extra length had been used in its construction, and planks placed on the edges of the cross-ties on either side of the track for use as a footway; that the street car company had invited pedestrians to use the trestle as a means of crossing the branch, and that it had been so used for more than six years; and negligence was charged against the company in failing to exercise ordinary care in guarding against injury to persons who might be on the trestle, and in failing to stop the cars after the position of the plaintiff should, in the exercise of ordinary care, have been discovered. By amendment it was alleged that "the defendants were grossly negligent in failing to have a car of sufficient size and power to transport the large railway cars" which were in the train that ran over the plaintiff; that the trolley car which was used was inade-

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quate for the service sought to be imposed upon it, and was overloaded at the time of the injury. This amendment was allowed over the objection of the defendants that it set up a new cause of action, and that its allegations were irrelevant, incompetent, and illegal, and did not set forth any act of negligence that would authorize a recovery. Exceptions pendente lite were filed to the allowance of the amendment, and error was assigned thereon in the bill of exceptions to this court. The answer of the street car company was, in effect, a general denial of all allegations of negligence in the petition and the amendment. In submitting the case to the jury the court charged, as matter of law, that the plaintiff was a trespasser on the trestle at the time of her injuries, and that the company owed her no duty whatever until her presence upon the trestle was discovered, when the duty arose to exercise ordinary care to avoid injuring her. A verdict was returned for the plaintiff for \$10,000. The company moved for a new trial on numerous grounds. Its motion was overruled, and it excepted.

1. It is clear that the amendment which was allowed over the objection of the defendant charged against it negligence of an entirely different character from that alleged in the original petition, but whether or not this constituted a new cause of action we do not, in the view that we take of the case, feel called upon to decide. It may be conceded, for the sake of the argument, that the amendment was erroneously allowed. The court, however, in its charge to the jury, instructed them as follows: "Your inquiry in this case as to whether the defendant company was negligent or not will be confined to the allegations of negligence that the plaintiff makes with reference to the conduct of the motorman after her presence became known to the motorman—I mean in reference to the motorman and other employees of the defendant upon the train; and you could not predicate a finding of negligence against the defendant company upon the allegations in reference to the loading of the cars, nor upon there being two cars, instead of one, attached to the motor car. So far as this plaintiff is concerned in this case, the defendant company had a right to load its cars as it pleased, and to attach as many cars to the motor car as it pleased, and owed to this plaintiff no duty whatever except to exercise all ordinary and reasonable care and diligence for the protection of this plaintiff as soon as her presence upon the track became known to the employees in charge of the motor car and the cars attached." In view of this charge, it would be idle to discuss whether or not the amendment should have been allowed. Indeed, in the light of the restrictions placed upon the jury by this instruction, the amendment and the evidence introduced under it could have had none but a beneficial effect upon the defendant's case; for if, as the amendment alleged and the witnesses testified, it is more difficult to stop a train of cars made up as this one was than would have been the

case had a locomotive engine or a better constructed motor car been used, and if the plaintiff could only recover in the event it was shown that the motorman, after discovering her presence on the track, could, in the exercise of ordinary care, have stopped in time to avoid injuring her, then it follows that any evidence germane to the amendment could only have a tendency to establish the contention of the defendant that it was impossible to stop the train by due care in time to prevent the plaintiff's injuries. The allowance of the amendment will, therefore, not work a reversal of the judgment of the lower court.

2. The motion for a new trial complains that: "The court erred in the following ruling, to wit: Plaintiff offered in evidence what purported to be a copy of the Carlisle Mortality and Annuity Tables, as contained in 70 Ga. p. 845, and defendant, at the time said tables were tendered, objected to the same being received as evidence, because there was no evidence to show that they were the Carlisle Tables. The court, over defendant's objections, admitted the copy of mortality tables, and overruled defendant's objections thereto." We find no difficulty, under the various rulings of this court, in holding that the ground of the motion above quoted does not disclose any error on the part of the trial court. This is a standard table, and is admissible in evidence when offered, without any proof of its correctness, or that it is in fact the Carlisle Table. In the case of *Western & Atlantic R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74, which is cited by counsel for the plaintiff in error as authority for the objection made, it was held that these tables are admissible in evidence without any proof of their correctness. From the opinion in that case it appears that counsel in the argument contended that there was no evidence before the court to show that the tables offered in evidence were what they purported to be, or that they were correctly figured in the volume of Georgia Reports from which they were taken, and that, when challenged, they were not evidence to prove any fact. As before stated, this is a standard table, and courts take judicial notice of it without proof. The court is presumed to know it wherever it sees it, whether in the appendix to 70 Ga. or elsewhere. See the dissenting opinion of Chief Justice Simmons and Associate Justice Lewis in the *Hyer Case*, *supra*, and the authorities therein cited, which fully sustain the position here taken. See, also, *Atlanta & West Point R. Co. v. Johnson*, 66 Ga. 259; *Central R. Co. v. Crosby*, 74 Ga. 738, 58 Am. Rep. 463; *Richmond & Danville R. Co. v. Garner*, 91 Ga. 27, 16 S. E. 110.

3. The defendant sought to prove by Shields, a witness for the plaintiff, who was connected with the amusement enterprise in which the plaintiff was engaged, that he (Shields) had been warned not to have the show people go over the trestle on foot, on account of the danger involved. It was not

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claimed that the alleged warning was given in the presence of the plaintiff, or that it was communicated to her in anyway. Shields emphatically denied that such a warning had been given. At the conclusion of his testimony on that subject the court, on motion of plaintiff's counsel, ruled the evidence out as hearsay, and not binding on the plaintiff, and this ruling is complained of in the motion for a new trial. The grounds of the complaint are that the testimony was admissible as throwing light on the question whether or not the defendant acquiesced in the use of the trestle by pedestrians; and, further, that the questions asked laid the foundation for an impeachment of the witness. It is quite clear that this evidence was not admissible for any purpose, and that the court properly excluded it from the jury. It is unnecessary to discuss whether evidence that one man had been warned to notify several other persons not to cross a trestle will be competent to meet the contention that the company had for more than six years invited pedestrians to use it as a footway, for in his charge to the jury the judge instructed them as matter of law that the plaintiff was a trespasser on the trestle, and had no right thereon. It will, of course, not be seriously contended that the evidence sought to be elicited, even had it been favorable to the defendant, would have bound Mrs. Monk, in the absence of any showing that the warning was given in her presence, or was in some way communicated to her. The answers given, therefore, being upon an utterly irrelevant and immaterial subject, could not form the basis of an impeachment of the witness. 1 Gr. Ev. (15th Ed.) § 462; Evans v. State, 95 Ga. 469, 22 S. E. 298. There is nothing in the case of East Tenn. R. Co. v. Daniel, 91 Ga. 768, 18 S. E. 22, in conflict with what is here laid down. It was there held: "Where a witness, by way of accounting for his presence at the scene of the killing of an animal, states that immediately before going there he made a purchase at a certain store, evidence is admissible in behalf of the opposite party showing or tending to show that he made no purchase on the occasion referred to. While this fact is not directly material on the circumstances of the killing, it is indirectly material, because it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence." It will be observed that the rule is there distinctly recognized that a witness may not be impeached upon a subject immaterial to the issues involved in the trial of the case, but it was pointed out that the evidence in question was indirectly material to an important phase of the case, viz., the presence of the witness at the scene of the killing. In the case at bar it was not shown that the subject upon which it was desired to impeach the witness Shields was even remotely material to the issues involved. It follows, therefore, that there is no merit in this ground of the motion.

4. Complaint is also made of the admission, over the defendant's objection, of the evidence of a witness who testified as to the usual means of stopping an electric car, and what is ordinarily the quickest way to stop such a car. It was objected that it was not shown that the witness had had experience in handling cars loaded like the one that ran over the plaintiff. We see no error in admitting this testimony. The witness was shown to have been an expert on the subject about which he was testifying. He had run as a motorman on electric cars in Atlanta for nearly three years, working on different lines, and had worked in the shops to learn something about electricity before he was put on a line. Regardless of the manner in which any particular car was loaded, it was clearly competent to show to the jury the usual means of stopping all electric cars under given conditions.

5. Shaw, the witness referred to in the preceding division of this opinion, was also asked by counsel for the plaintiff within what distance a single car could be stopped, under given conditions, going at a given rate of speed, on a grade at a given point in the city of Atlanta, which was admitted to be a steeper grade than the one at the place where the plaintiff was injured. The evidence was objected to as irrelevant, on the ground that "the stopping of a train of cars is a good deal different from stopping one car in the city," and that the evidence was inadmissible without showing that the grade and the equipment of the cars at the two places were substantially the same. The objection was overruled, and the evidence admitted, which ruling is assigned as error in the motion for a new trial. While we fail to see the substantial value to the plaintiff of this evidence, its admission can hardly be held to be erroneous. It was competent to show to the jury by expert testimony within what distance a single car could be stopped on a steep grade, not as proof that the cars which ran over the plaintiff could have been stopped within the same distance, but as throwing light upon the general question of stopping cars on grades, and from that they might draw their own conclusions as to the relative difficulty of stopping a more heavily loaded train of cars on a lighter grade.

6. The complaint in the motion that the court erred in admitting the evidence of a witness as to the general effect of curves on the speed of a car is totally without merit. It was in evidence that the track of the defendant company curved near the trestle on which the plaintiff was injured, and that the cars which ran over her passed over this curve before coming on the trestle. It was clearly admissible to show to the jury the general effect of curves upon the speed of cars irrespective of their motive power, in order to show that the natural tendency in the case under consideration was for the speed of the cars to be diminished before the train came upon the trestle. Nor do we think there was any error in allowing

the plaintiff to prove, by witnesses who were shown to have been experienced steam railroad men, what effect the curve would naturally have upon the speed of the two cars attached to the motor car, and within what distance such cars could be stopped under given conditions. This evidence was objected to on the ground that the witnesses were not shown to have been experts in the running of electric cars, and consequently were not competent to give their opinions upon the questions propounded to them. While it is true that they were not shown to have been experts in electricity or in the running of electric cars, they were, as has been stated, shown to have had expert knowledge in the running of trains on steam railroads; and it must be borne in mind that the cars about which they testified were ordinary steam railroad cars. It would seem to go without the saying that their opinions as to the running and the ability to control such cars under given conditions must necessarily have been more valuable than that of an ordinary electric motorman, whose opportunities for obtaining such information are, in the nature of things, exceedingly limited.

7. The grounds of the motion for a new trial which complain of the refusal of the court to charge as requested present no reason for reversing the judgment rendered. As pointed out in the statement of facts preceding this opinion, the court charged as matter of law that the plaintiff was a trespasser on the defendant's track, and that the street-car company owed her no duty whatever except to exercise ordinary care to avoid injuring her after her presence on the trestle became known to the employees of the company. As to negligence the jury were expressly restricted to the single issue whether, after discovering Mrs. Monk's presence and peril, the motorman used ordinary care to avoid running over her. The charge as given went to greater lengths in favor of the defendant than any of the charges which were requested by its counsel. Of course, the defendant cannot complain of the refusal to charge the exact words requested, when the substance of the requests was covered by the charge given.

8. The grounds of the amendment to the motion for a new trial which have not been dealt with in the foregoing were abandoned by counsel, and not argued in this court. We are left, then, the single question, was the verdict contrary to the evidence? As will have been seen, under the charge of the court, it was necessary, in order for the plaintiff to recover, that the jury should find that the plaintiff's injuries were wantonly inflicted. There was evidence that the motorman was warned, before the cars reached the trestle, that the plaintiff and her party were on it, and that he made no effort to stop, but went on, indifferent to their fate. The plaintiff testified: "The people on the trestle * * * stopped, and looked back, and saw the car coming towards us. I screamed. I screamed at the top of my voice. The other people

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screamed also. It (the car) did not stop at all. It didn't seem to slow up to me. * * * Then, after it reached the trestle, the speed was not abated or slackened. * * * As to what effort the motorman made to wind his brake, I saw none. As he got very near, I begged for him to stop. When he got close to me, I hallooed, 'Stop, stop, stop; oh, please stop!' * * * He did not stop. * * * He said 'Go to hell!' " Other evidence for the plaintiff was to the same effect, and there was ample authority for the jury to find that the motorman, after discovering the presence of the party on the trestle, made no effort whatever to check the speed of the cars. We confess that the evidence of the plaintiff's witnesses as to the conduct of the motorman after learning of the perilous situation in which Mrs. Monk was placed almost staggers credulity, for it is well-nigh inconceivable that any man could be such a monster as to deliberately and wantonly run down, and perhaps slaughter, a half score of helpless victims placed in such a situation as were these persons. It was for the jury, however, to say whether or not this evidence was the truth. They had all the facts before them, and it was peculiarly their province to pass upon questions of this sort. The trial judge was satisfied with their finding, and, as has been seen, that finding was amply supported by evidence. The overruling of the general grounds of the motion for a new trial that the verdict was contrary to law and the evidence will not, therefore, work a reversal of the judgment of the court below.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

WESTPHAL v. ST. JOSEPH & B. H. ST. RY. CO.

(*Supreme Court of Michigan, July 14, 1903.*)

[96 N. W. Rep. 19.]

Accident on Street Car Track—Contributory Negligence—Question for Jury.

Where plaintiff's own testimony shows he was using due diligence to get off the track of an approaching car, and a witness for him states he went right on the track, the question of his negligence is for the jury.

Impeaching Witnesses.

A party cannot impeach his own witness by showing contradictory statements made by him because his testimony on cross-examination was not such as he expected.

Accident on Street Car Track—Negligence—Question for Jury.*

Where negligence charged against a street car company is the fail-

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see monograph appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838; *Southern Electric Ry. Co. v. Hageman* (C. C. A.), 7 R. R. R. 681, 30 Am. & Eng. R. Cas., N. S., 681; *Cox v. Wilmington City Ry. Co.* (Del.), 7 R. R. R. 818, 30 Am. &

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ure to reasonably check and control the speed of the car, and the evidence shows the car was heavily loaded and approaching plaintiff on a down grade, the question of negligence is for the jury.

Error to Circuit Court, Berrien County; Orville W. Coolidge, Judge.

Action by Frederick Westphal against the St. Joseph & Benton Harbor Street Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

Plaintiff was driving his horse, hitched to a road wagon, over the Wayne street viaduct, over a bayou of the St. Joseph river, between the cities of St. Joseph and Benton Harbor. The viaduct is 300 feet long and 19 feet wide, with guard rails on either side. The defendant has two tracks across this viaduct. The street slopes gradually from the bluff on the south westerly bank of the bayou to the level of the river bottom on the opposite side. In crossing over this viaduct vehicles must of necessity travel upon the street railway tracks. Plaintiff came from a street running at right angles with Wayne street. As he approached the tracks he looked for a car, but saw none, and then turned to the left to cross the viaduct. When about the middle of the viaduct he heard a signal bell, looked around, and saw a car approaching. The car struck the hind end or hind wheel of his wagon, overturned the wagon box, and threw him to the ground. He was sitting on a spring seat near the front of the box. The box sat loose on the wagon. He testified that the box was thrown from the wagon but the wagon did not tip over.

The negligence charged is the propulsion of the car at a high, dangerous, and negligent rate of speed, and failure to

Eng. R. Cas., N. S., 818; Danville Ry. & El. Co. *v.* Hodnett (Va.), 7 R. R. R. 170, 30 Am. & Eng. R. Cas., N. S., 170; Klockenbrink *v.* St. Louis & M. R. R. Co. (Mo.), 7 R. R. R. 63, 30 Am. & Eng. R. Cas., N. S., 63; Barry *v.* Burlington Ry. & Light Co. (Iowa), 6 R. R. R. 675, 29 Am. & Eng. R. Cas., N. S., 675; Louisville Ry. Co. *v.* French (Ky.), 6 R. R. R. 473, 29 Am. & Eng. R. Cas., N. S., 473; Adams *v.* Wilmington & N. Electric Ry. Co. (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307; Fenner *v.* Wilkesbarre & W. V. Traction Co. (Pa.), 2 R. R. R. 617, 25 Am. & Eng. R. Cas., N. S., 617; Read *v.* City & Suburban Ry. Co. (Ga.), 3 R. R. R. 278, 26 Am. & Eng. R. Cas., N. S., 278; Memphis St. Ry. Co. *v.* Norris (Tenn.), 4 R. R. R. 659, 27 Am. & Eng. R. Cas., N. S., 659; Thompson *v.* Missouri, K. & T. Ry. (Mo.), 2 R. R. R. 832, 25 Am. & Eng. R. Cas., N. S., 832; Gray *v.* St. Paul City Ry. Co. (Minn.), 5 R. R. R. 698, 28 Am. & Eng. R. Cas., N. S., 698; West Chicago St. R. Co. *v.* Petters (Ill.), 2 R. R. R. 612, 25 Am. & Eng. R. Cas., N. S., 612; Bonham *v.* Citizens' St. R. Co. (Ind.), 2 R. R. R. 787, 25 Am. & Eng. R. Cas., N. S., 787; Thompson *v.* Missouri, K. & T. Ry. Co. (Mo.), 2 R. R. R. 832, 25 Am. & Eng. R. Cas., N. S., 832; White *v.* Vicksburg R., Power & Mfg. Co. (Miss.), 2 R. R. R. 596, 25 Am. & Eng. R. Cas., N. S., 596; Welsh *v.* United Traction Co. (Pa.), 2 R. R. R. 595, 25 Am. & Eng. R. Cas., N. S., 595; Birmingham Ry. & Electric Co. *v.* Baker (Ala.), 2 R. R. R. 17, 25 Am. & Eng. R. Cas., N. S., 17; Baier *v.* Camden & S. Ry. Co. (N. J.), 3 R. R. R. 911, 26 Am. & Eng. R. Cas., N. S., 911; Bedell *v.* Detroit, Y. & A. A. Ry. (Mich.), 5 R. R. R. 715, 28 Am. & Eng. R. Cas., N. S., 715.

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reasonably control and check the speed of the car. Plaintiff testified: "When I heard the bell I tried to get out of the track. To get off the track, I turned to my left, so I tried to get out. I do not know where the horse was when the wagon was upset. When the car struck me the horse was on the left-hand track. I had guided him off the right-hand track. At the time I was struck the front wheels of my wagon were pretty near over to the left rail. The hind wheels were over to the right track. At the time I was struck my horse was over the left-hand track. My wagon is about eight feet long. I couldn't tell how far apart the inside rails of the street car track are. At the time the car struck me my horse was headed to the left. His front feet was in the left-hand track. And he was headed toward the canal, and the front wheels were in the left-hand track, too, and the hind wheels—one was between them two tracks and one in the track. This at the time the car struck me." One Samuel Hannon, a passenger on the street car, was called as a witness for the plaintiff. He stood on the platform beside the motorman. On direct examination, Mr. Hannon testified that when the car first struck the wagon "the horse was angling across the track; that when plaintiff was thrown from the seat he struck upon his feet; that the horse began to run; that plaintiff's feet became entangled in the lines, and he was dragged for a short distance." On cross-examination he testified that plaintiff was pulling his horse to the right onto the track rather than to the left and away from it. Defendant introduced no testimony, and the court directed a verdict for the defendant on the ground that "Mr. Hannon's evidence shows such negligence on the part of the plaintiff that he cannot recover legally."

Gore & Harvey, for appellant.

Humphrey S. Gray and M. L. Howell, for appellee.

GRANT, J. (after stating the facts). 1. If recovery depended upon the testimony of Mr. Hannon, the court may have been right in directing a verdict. But plaintiff was not bound by his testimony. Plaintiff's counsel claim that they were taken by surprise by the testimony given upon cross-examination. According to plaintiff's testimony, he was using due diligence to get off the track of the approaching car, and to give the car the right of way. It is undoubtedly true that Mr. Hannon was in better position to observe the manner of the accident and the speed of the car than the plaintiff, who testified that as soon as he heard the bell he attempted to put himself in a place of safety, but this did not make his testimony conclusive. We think the question of plaintiff's negligence should have been submitted to the jury.

2. Plaintiff's counsel subjected Mr. Hannon to a rigid redirect examination, and asked him if he had not made certain contradictory statements to certain persons, which he

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denied. They then sought to show these contradictory statements, which were excluded by the court. If under any circumstances a party litigant may in a civil action impeach his own witness, whom he is not obliged to call, by proving contradictory statements, this case is not one to justify the practice. The witness was not asked upon direct examination in which direction plaintiff was guiding his horse. On cross-examination he testified that he was pulling the horse's head to the right instead of to the left, as he should have done. A party will not be permitted to impeach his own witness by showing contradictory statements made by him because his testimony on cross-examination is not such as he expected the witness to give. We settled this question in criminal cases, in *People v. Elco* (Mich.) 91 N. W. 755, where the people are obliged to call the witnesses. The rule has not been extended by this court in civil cases, when a party is under no obligation to call the witness. Counsel cite *Darling v. Thompson*, 108 Mich. 218, 65 N. W. 754, and *Smith v. Smith*, 125 Mich. 234, 84 N. W. 144, as supporting their contention. Counsel are in error. These cases and other similar ones hold only that the party calling the witness is not bound by his testimony if the testimony of other witnesses shows a different state of facts.

3. Defendant contends that there was no evidence of negligence on the part of the defendant, and that for this reason the verdict should be sustained. If the sole claim of negligence had been that the defendant propelled its car at a high, dangerous, and negligent rate of speed, the court might have been justified in holding that no negligence in this respect was shown. But the other negligence alleged was the failure to reasonably check and control the speed of the car. The care to be used in keeping a car under control depends upon the circumstances of each particular case. Greater care would be required in some cases than in others. The car, heavily loaded, was approaching the plaintiff upon down grade. Plaintiff was entitled to reasonable time, by the exercise of reasonable effort, to drive his wagon out of reach of the approaching car. If plaintiff was exercising due care, which must be the first question to be determined by the jury, we think that the question of defendant's negligence belonged to the jury. *Rouse v. Detroit Ry. Co.*, 128 Mich. 153, 87 N. W. 68; *Hicks v. Citizens' Street Ry. Co.*, 25 L. R. A. 508.

Judgment reversed, and new trial ordered. The other Justices concurred.

ST. LOUIS, I. M. & S. RY. CO. v. HALL.

(*Supreme Court of Arkansas, March 21, 1903.*)

[74 S. W. Rep. 293.]

Fires Set by Locomotives—Damages—Opinion Evidence.

In an action against a railroad for burning of grass, owing to es-

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cape of sparks from a locomotive, it was error to permit a witness to give his opinion as to the amount of damage done.

Statute of Frauds.

The statute of frauds is no defense where not pleaded.

Tenant at Will.

Though four months have elapsed from the time one took possession of land under the verbal consent of the owner, his possession with the consent of the owner renders him a tenant at will.

Same.

A tenant at will of land has a right to the grass thereon.

Same.

A tenant at will of land may recover for wrongful destruction of uncut and standing grass.

Damages.

The measure of his damage was the difference between the usable value of the land before and after the grass was burned down to the time of the trial.

Appeal from Circuit Court, Pope County; William L. Moose, Judge.

Action by W. C. Hall against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The appellee sued the appellant for \$200, the alleged value of grass upon 33 acres of land standing thereon, alleged in his complaint to have been destroyed by fire started by a spark from a defective engine drawing an excursion train going in an easterly direction over the track of the railway of appellant on the 22d day of August, 1899, in the county of Pope, in the state of Arkansas. The appellant answered the complaint, and specifically denied each allegation in the complaint. The appellee, W. C. Hall, testified in his own behalf that he did not see the fire start; that he had the permission of his wife, who owned the land on which the grass was, and which was about 35 acres, to fence the land and use it for a meadow; that it was covered with ordinary wild grass and wild clover, which he intended to mow; that there were weeds upon the knolls, and he thought that he could have gotten 25 or 30 tons of hay off the field. He thought he was damaged at least \$200 by the fire burning the grass. He says that he had no contract with his wife about the meadow: "I told her [he testified] that I wanted to make a meadow out of the land, and she said: 'All right. Take it and fence it, and have it for your own use as long as you want it.'" He was asked: "How much were you damaged by that fire? Answer. I was damaged at least \$200. Ques. How many cattle could you have gotten to pasture on that place, had it not been burned off? Ans. Fifty head." J. B. Evans was allowed to testify as follows: "Ques. What would it have been worth for pasturage? Ans. \$65 or \$75. Not less than that." All this was over the objection of the defendant, to which it excepted.

Lovich P. Miles and Dodge & Johnson, for appellant.

HUGHES, J. (after stating the facts). Generally "a witness is never permitted to estimate the amount of his damage for the doing or not doing of a particular act, which a party has sustained thereby." This is the province of the jury, and a witness cannot be allowed to usurp it. *Railway v. Haynes*, 47 Ark. 501. The rule generally is that a witness should state facts, and the jury should find from the facts in evidence what the damages are, if any. *Railway v. Ayres*, 67 Ark. 375, 55 S. W. 159; *Sedgwick on Damages*, § 1293; *Railway v. Jones*, 59 Ark. 110, 26 S. W. 595; *Lamson on Expert & Opinion Evidence*, p. 448.

The appellant contends that the plaintiff's claim is within the statute of frauds. But the statute was not pleaded, and, had it been, could not have availed the defendant. "A third party cannot, in a case where his own obligations growing out of the existence of the contract in question are concerned, deny the obligation of the contract upon the party who was to be charged thereby, or take any benefit of the protection which such party could claim in an action brought upon it against himself." Section 135, *Browne on Statute of Frauds*.

What right had the plaintiff to sue? He was a tenant at will. Though four months over one year had elapsed from the time he took possession of the land under the verbal permission of his wife, she, who owned the land, still permitted him to remain in possession. At least, she had not interfered with him or demanded possession of him. Had he planted a crop, he might have been tenant for the second year, or tenant from year to year. But he had planted no crop. He had fenced the land, and was in possession under the original verbal permission of his wife, which had not been revoked. We think he had the right, being thus in possession, to cut the grass on the land.

If any permanent injury resulted to the freehold from the burning of the grass, the wife was damaged, and had the right to sue. But the wrongful destruction of the grass, which was uncut and standing on the land, was a damage to the plaintiff, for which he might maintain an action.

The measure of his damage was the difference between the usable value of the land before and after the grass was burned down to the time of the trial.

"If a stranger cuts trees, the tenant at will shall have an action, as shall also the lessor; regard being had to their several losses." 2 *Coke upon Littleton*, 57a, quoted in *Hayward v. Sedgley*, 31 Am. Dec. 64. See *Foley v. Wyeth*, 79 Am. Dec. 771. "One having only a possessory right to land may recover for an injury to his use and enjoyment of it, but not for a permanent injury to the property." *Seely v. Alden*, 6 Pa. 352. In section 69, *Sedgwick on Damages*, it is said: Any one having an interest in land is liable to suffer injury in respect to his right; and accordingly if his right, however limited it be, is injured, he may recover compensation equal

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to his individual loss. The general rule may be said to be that the extent of the injury to the plaintiff's proprietary right, whatever it may be, furnishes the measure of damages. The owner of a freehold may recover for an injury which permanently depreciates his property, while a tenant or one having only a possessory right may recover for an injury to the use and enjoyment of that right.

For the error in the admission of the improper opinion evidence in regard to plaintiff's damages above referred to, the judgment is reversed and the cause is remanded for a new trial.

BATTLE, J., did not participate.

ALABAMA GREAT SOUTHERN R. CO. v. GUEST.

(*Supreme Court of Alabama, April 7, 1903.*)

[34 So. Rep. 968.]

Accidents on Track—Trespassers—Willful Killing.*

Where defendant's servants ran certain cars, from which the engine had been detached, at a high rate of speed, and without signals of their approach, along the track where they knew persons were wont to frequent, or where people used the track as a passway with such frequency and in such numbers that defendant's employees would be charged with knowledge thereof, and plaintiff's intestate was killed by being struck from the rear by such cars, which defendant's brakeman was unable to stop after discovering intestate's peril, defendant was liable for willfully killing intestate, notwithstanding he was a trespasser and guilty of contributory negligence.

Same—Same—Same—Evidence.

In an action for the alleged willful killing of plaintiff's decedent by a train operated by defendant, the complaint alleged that the killing occurred within an incorporated town, and that at or near its main street two cars and a caboose were detached from defendant's train and allowed to run down the main track at a speed of from 3 to 16 miles per hour, with one of the brakes on the cars in a defective condition, and that plaintiff was struck by such cars from the rear while walking along the track between 11 o'clock and noon of the day of the injury: *held*, that an averment that at the hour of the occurrence from 30 to 50 people walked along defendant's track at the place of the injury, and that such fact was well known to defendant's servants and agents, was relevant to the question of wantonness on the part of defendant's employees, and it was therefore error for the court to strike the same from the complaint.

Appeal from Circuit Court, De Kalb County; Jos. A. Bilbro, Judge.

Action by J. H. E. Guest, as administrator of the estate of William Dean, deceased, against the Alabama Great Southern Railroad Company, to recover for the alleged willful killing

*As to the care due trespassers and licensees on track, see footnote appended to *Harris v. Atlantic C. L. R. Co.* (N. Car.), 7 R. R. R. 132, 30 Am. & Eng. R. Cas., N. S., 132; *Carrier v. Missouri Pac. Ry. Co.* (Mo.), 7 R. R. R. 585, 30 Am. & Eng. R. Cas., N. S., 585; note, 20 Am. & Eng. R. Cas., N. S., 322.

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of plaintiff's decedent. From a judgment granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Amos E. Goodhue, for appellant.

Howard & Isbell, for appellee.

HARALSON, J. Issue was joined and the case was tried upon counts 2, 3, 6 and 7, each of which sets up that the injury of plaintiff's intestate was caused by the willfulness, wantonness or intentional act of defendant's agents and servants. It is unnecessary to notice the second count, as no question arises on it.

The third count proceeds on the allegation that defendant's agents and servants while operating a freight train in De Kalb county, uncoupled it in the town of Ft. Payne, detaching the engine, leaving two cars and a caboose to run down the main line of track without an engine attached to them, and after discovering that plaintiff's intestate was in great peril and danger, willfully, wantonly and intentionally, through its agents or servants, ran said cars upon and against intestate and killed him.

The sixth, like the third, bases the alleged willfulness and wantonness on the allegation, that after discovering intestate's peril and danger, the servants or agents of defendant ran said cars against and over intestate; and the seventh, on the averment, that after the discovery of the intestate's peril and danger by defendant's agents and servants, they could have avoided and prevented said injury but for the willful, wanton and intentional acts of defendant's [servants and agents] in running said cars and caboose upon and over plaintiff's intestate.

The sixth count contained the allegation: "And at said hour [about noon] a great many people passed on foot [along said track], as was well known to defendant's agents and servants." This averment was, on motion of defendant, stricken from this count.

The plaintiff during the trial offered evidence to show that at the point of the killing, from 30 to 50 people walked along said track from 11 a. m. to noon of each day for six months prior to the killing, which evidence, the court, on the objection of the defendant, would not allow.

The trial resulted in a verdict and judgment for the defendant. The plaintiff moved for a new trial on grounds among others, that the court erred in striking the averment above quoted from the sixth count of the complaint, and in not allowing the plaintiff to introduce the evidence above stated, as to the number of people who passed daily along the track at the point of the killing.

The court granted the motion for a new trial, stating in the judgment entry, that the court was of the opinion and found, that the verdict of the jury was not contrary to the evidence and was not contrary to the charge of the court, but that the

court was of the opinion that it erred in excluding said proposed evidence from the jury, and in striking from the complaint the averment as above set out.

The evidence showed without conflict, that the killing of plaintiff's intestate occurred within the limits of the incorporated town of Ft. Payne, near the freight depot of the railroad; that there were three tracks at this point, the main line being in the center of the other two, and about eight feet from each; that Main street in said town crosses the railroad tracks just north of the depot building, which is on the south of the street, that intestate had walked south, down the main line, having gotten thereon 35 or 40 yards north of the north side of the street where it crosses the railroad, and had walked on the line clear across the street with his back to the cars, and had proceeded to a point south of the crossing, when he was overtaken and struck by the cars; that the house where he lived, was on the east side of the track and south of the crossing, about 100 yards, and deceased had proceeded down to a point nearly opposite his house, as he had frequently done. It was further shown, that defendant's train was uncoupled, about 200 yards north of Main street, and two of the cars and a caboose, which overtook intestate, were let down the main track, and the engine and other cars went down on the west side track.

One witness testified to having seen deceased killed; that the cars were going pretty fast, and the brakeman who was sitting on his brake looking towards town, did not put his brake up until after the cars had run over deceased. Another testified, that he saw the cars when they were right on deceased; that the brakeman was tightening his brake just before the collision, and loosened his brake just as soon as deceased was struck; that the brakeman was not looking towards town, and the cars were not running very fast.

Another witness for plaintiff testified that in his opinion the cars were moving 15 or 16 miles an hour.

The conductor of the train testified for the defendant, that the cars struck deceased 65 or 70 feet below the crossing; that he had come down on the caboose and stepped off onto the platform of the depot, as the cars passed, and he had not seen deceased before the cars struck him, at which time they were going about two or three miles an hour; that one of the brakes was in good order, and the other was out of shape, and the cars could have been stopped with the good brake in 15 feet.

One of the brakemen testified that the car was just about to strike deceased when he saw him; that he set up the brake on the front car, and it would not hold, when he ran back to the other brake and set it up and notified the brakeman in the caboose to set up his brake, when the train stopped and the train was going about three miles an hour.

It cannot be denied that plaintiff's intestate was a tres-

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passer on defendant's track, to whom the company owed no duty except the exercise of reasonable care to avoid injuring him, if and after his peril became apparent to its employees, but they had no right to kill him on this account, if they could avoid it. *Haley v. K. C. M. & B. R. Co.*, 113 Ala. 640, 21 South. 357. The doctrine thus stated and recognized, is not to be taken as of unqualified and unshaded application in all cases. A trespasser may not be yet discovered on the track of the company, but if the employee had reason to believe he was there, it would be wantonness to take no care not to kill him. "When a railroad runs its track through districts of a city, town or village densely populated, and the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine over the track in such places to keep a lookout. This duty is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to guard against inflicting death or injury in places and under circumstances where and when it is likely to result unless due care is observed. The duty arises when the circumstances exist which call for its exercise." *S. & W. R. Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *L. & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *Same v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; *M. & C. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231; *L. & N. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609.

"To run a train at a high rate of speed and without signals of approach, where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers—facts known to those in charge of the train—as that they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, would render the employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured and no fault on the part of the servants after seeing the danger." *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Highland A. & B. R. Co. v. Robbins*, 124 Ala. 113, 27 South. 422.

The facts of this case leave ample room for the application of this doctrine. The killing occurred within the limits of an incorporated town, and at or near its main street; a cut of two cars and a caboose detached from the train was allowed to run down the main track at a speed estimated by different witnesses, at from 3 to 15 or 16 miles an hour, with one of the brakes on the cars out of working order. The court struck from the sixth count as matter of irrelevant consideration, as above stated, the averment, that at the hour of the occurrence a great many people passed on foot, as was well

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o defendant's agents and servants, and refused to e plaintiff to prove that at the point of the killing, to 50 people walked along said track from 11 a. m. to each day (between which hours the plaintiff's in- was killed), for six months prior to the killing. ere conditions which according to the authorities oper to be proved for the consideration of the jury, in ung whether the conduct of defendant's employees nton, overcoming any negligence of the intestate ay have contributed to his injury. The court erred lings in this respect, in striking the part of the sixth ferred to, and in excluding the evidence offered, and perly sought to correct the error by granting a new ed.

STATE v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, Oct. 19, 1903.*)

[96 N. W. Rep. 904.]

s—Failure to Stop Train—Penalty—Defective Brake—Appli- of Statute.

2073, declares that any engineer who fails to bring his a full stop before crossing an intersecting railroad on level shall forfeit \$100, and that the railroad shall forfeit the 200: *held* that, where the train failed to stop because the ere defective, so that the engineer was not guilty of se, the railroad was not liable.

ame—Same—Same—Same.

ense was not committed if the engineer attempted to stop , but was unable to do so.

ame—Same—Constitutionality of Statute.

atute was not unconstitutional as imposing a penalty on a for the offense of its engineer, as it merely exacted a duty rporation of seeing that its employee acted in obedience to te.

ame—Same—Burden of Proof.

rden on the state of proving that a railroad engineer was lia- : penalty imposed by Code, § 2073, for failure to stop his train ossing an intersecting railroad on the same level, was not y proof that the train did not stop.

ame—Same—Proof.

action against a railroad for a penalty for failure to stop its ore crossing an intersecting road, the general rules prevail- vil actions govern, and the state is not bound to prove the ion of the offense beyond a reasonable doubt.

al from District Court, Story County; J. H. Richard,

lefendant's line of road crosses that of the North- Railroad Company at Slater on the level. On th day of February, 1902, the defendant, through neer, pulled its freight train over said crossing with- oping as required by section 2073 of the Code, and in ion recovery of the penalty as therein provided was

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claimed. Trial to jury resulted in verdict and judgment for the state. The defendant appeals. Reversed.

J. C. Cook, E. H. Addison, and H. Loomis, for appellant.
G. A. Underwood, for the State.

LADD, J. The defendant admitted the failure of its train to stop within 800 feet and more than 200 feet from the crossing, and interposed the defense that the engineer in charge did all he could to stop it, but that, owing to the brakes not working in the usual manner, the momentum of the train carried it over the crossing. The court submitted the case to the jury on the theory that the burden of proof was on the defendant, in order to exonerate itself from liability, to show by a preponderance of evidence that the failure to stop was not due to any negligence on the part of its employees in operating the train, or of the company in not having proper appliances, or in keeping those had in proper condition, and that the company might be liable even though the engineer was not. Possibly that should have been the law, but it was not so written by the Legislature. The statute in question reads: "All trains run upon any railroad in this state which intersects or crosses any other railroad on the same level shall be brought to a full stop at a distance of not less than two hundred and not more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed, except as otherwise provided in this chapter. Any engineer violating the provisions of this section shall forfeit one hundred dollars for each offense, to be recovered in an action in the name of the state for the benefit of the school fund, and the corporation on whose road the offense is committed shall forfeit the sum of two hundred dollars for each offense to be recovered in like manner." Section 2073, Code. The latter part of the statute is purely penal in character, with the evident object of punishing the offender, rather than afford a remedy for the wrongful act. In this respect it differs radically from provisions awarding damages flowing from certain acts, such as the setting out of fire. Its meaning, then, cannot be extended beyond the terms employed. But one offense is denounced by it, and that is the omission of the engineer to stop the train as required. The first sentence commands what shall be done—defines a duty; the first clause of the second sentence imposes a penalty on any engineer for "each offense" of omitting such duty; the second clause of the second sentence adds a penalty against the corporation "on whose road such offense is committed." To what do these last words refer? Manifestly, to the offense of which the engineer is guilty. No other is mentioned in the section. The statute cannot be fairly read otherwise. The thought seems to have been that, as the engineer controls the train, the fault in failing to stop as required is primarily his, and secondarily that of the company for which he acts. There is no ground for holding that the company may be liable inde-

pendent of any fault of the engineer. The forfeiture of the corporation is made to depend upon his guilt of the offense defined, and upon that only.

2. As the statute is purely penal in character, it ought not to be construed as fixing an absolute liability. A failure to stop may sometimes occur notwithstanding the utmost efforts of the engineer. In such event his omission cannot be regarded as unlawful. The law never designs the infliction of punishment where there is no wrong. The necessity of intent of purpose is always to be implied in such statutes. An actual and conscious infraction of duty is contemplated. The maxim, "*Actus non facit reum nisi mens sit rea*," obtains in all penal statutes unless excluded by their language. See *Regina v. Tolson*, 23 Q. B. Div. 168, where it was said, "Crime is not committed where the mind of the person committing the act is innocent." See, also, *Sutherland on Statutory Construction*, § 354 et seq. No doubt many statutes impose a penalty regardless of the intention of those who violate them, but these ordinarily relate to matters which may be known definitely in advance. In such cases commission of the offense is due to neglect or inadvertence. But even then it can hardly be supposed the offender would be held if the act were committed when in a state of somnambulism or insanity. As it is to be assumed in the exercise of the proper care that the engineer has control of his train at all times, proof of the mere failure to stop makes out a *prima facie* case. But this was open to explanation, and if, from that given, it was made to appear that he made proper preparation, and intended to stop, and put forth every reasonable effort to do so, he should be exonerated. See *Furley v. Ry. Co.*, 90 Iowa, 146, 57 N. W. 719, 23 L. R. A. 73. This, however, did not shift the burden of proof. It was still on the state to show that the offense had been committed (see *Chaffee v. U. S.*, 18 Wall. 517, 21 L. Ed. 908); not, however, by proof beyond a reasonable doubt, as contended by appellant. Suit for a penalty is by ordinary proceedings, and the general rules prevailing in civil actions should govern. Ordinarily, a party to succeed must establish the averments of his petition by a preponderance of evidence only. There are exceptions in equitable actions, in which clear and satisfactory evidence is required for the reformation of an instrument and the like, but we now recall no instance of an action to be prosecuted by ordinary proceeding in which more than a bare preponderance of the evidence is exacted. *McAnnulty v. Seick*, 59 Iowa, 586, 13 N. W. 743; *Coit v. Churchill*, 61 Iowa, 296, 16 N. W. 147; *Truman v. Bishop*, 83 Iowa, 697, 50 N. W. 278; *Callan v. Hanson*, 86 Iowa, 420, 53 N. W. 282; *Jamison v. Jamison*, 113 Iowa, 720, 84 N. W. 705. Even though a criminal act be the basis of recovery, the same rule obtains. *Welch v. Jugenheimer*, 56 Iowa, 11, 8 N. W. 673, 41 Am. Rep. 77; *Riley v. Norton*, 65 Iowa, 306, 21 N. W. 649. An action for a penalty or forfeiture should form no exception to the rule. A civil

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liability only is involved, and none of the reasons for exacting full proof, save the imputation of wrongdoing as in a criminal action, obtain. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820; *Hitchcock v. Munger*, 15 N. H. 97; *State v. Kansas City, etc., R. Co.*, 70 Mo. App. 634; *Hawloetz v. Kass (C. C.)* 25 Fed. 765; 16 Ency. P. & P. 295. As said in the first of the above cases: "The purpose of the action is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused." *Chaffee v. U.*, S. 18 Wall. 516, 21 L. Ed. 908, is sometimes cited to the contrary, and seems to have been relied on in reaching the conclusion that the intensity of proof should be beyond a reasonable doubt in *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 195, 19 S. W. 470; but, as pointed out in *Hawloetz v. Kass*, *supra*, that question does not appear to have been considered. See, also, *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646. The weight of authority is with our conclusion that the right to recover may be established by a preponderance of the evidence. Appellant questions the constitutionality of the statute in so far as it imposes a penalty upon the corporation for an offense of the engineer. As we understand the argument, it is that the Legislature has no power to enact a statute punishing one person for an offense committed by another. Such is not the purport of this statute, however. The engineer is a mere employee or agent of the corporation. He is selected by it for this position of great responsibility in the operation of its property, and is under its directions. The statute exacts of the corporation the duty of seeing to it that such employee or agent do this in obedience to the statute, and on failure to do so inflicts a penalty, not alone for the omission of the engineer, but for its failure to compel the proper discharge of his duty. Other errors assigned will not be likely to arise on another trial.

Reversed.

CUSTER *v.* BALTIMORE & O. R. Co.

(*Supreme Court of Pennsylvania, July 9, 1903.*)

[55 Atl. Rep. 1130.]

Crossings—Lawful Speed—Country Crossings.*

Though in cities and populous districts the speed of trains must be

*See *New York, etc., R. Co. v. Kistler (Ohio)*, 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340; *Atchison, T. & S. F. Ry. Co. v. Judah (Kan.)*, 4 R. R. R. 937, 27 Am. & Eng. R. Cas., N. S., 937; *Georgia R. & B. Co. v. Cromer (Ga.)*, 12 Am. & Eng. R. Cas., N. S., 318 (question for jury); *Sutton v. Chicago, etc., R. Co. (Wia.)*, 10 Am. & Eng. R. Cas., N. S., 100 (forty miles an hour not negligence per se).

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moderated, there is no limit to the speed at which a railroad company may run its trains through the open country and over country road crossings.

Same—Same—Watchmen.

A railroad may run its trains at a high speed across a highway where it has stationed a watchman, though the highway is within the limits of a city or a populous district.

Accident at Crossing—Question for Jury.

In an action for injuries at a grade crossing, evidence *held* insufficient to take the case to the jury.

Appeal from Superior Court.

Action by Isaac R. Custer against the Baltimore & Ohio Railroad Company. From a judgment of the superior court affirming an order, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Oliver B. Dickinson, for appellant.

William B. Broomall, for appellee.

POTTER, J. The trial court entered judgment of compulsory nonsuit in this case, and refused, upon motion, to take it off. The superior court affirmed the judgment of the trial court, and its action in so doing is here assigned as error.

The appellant contends that he was entitled to have the jury pronounce upon the effect of the facts, which were undisputed, and that it, rather than the court, should have determined whether the defendant was negligent. But as the conduct of the parties is not in dispute, and as all the facts appear clearly and distinctly in the evidence, and there is no conflict in the testimony, the only question for decision was as to the legal effect or value of the facts. Whenever the facts are ascertained, the rule of conduct, or, in other words, the rule of law, to be applied, is to be determined and laid down by the court, and is not to be left to be defined by the accidental feelings of a jury. It would be an easy way for the court to avoid responsibility, when the circumstances are complex, or the question is difficult, to throw the whole case in a lump to the jury. But to do this, when, as in the present instance, no doubt exists as to the actual conduct of the parties, and where none of the facts are in dispute, would be an evasion of duty and the surrender of a judicial function. The law tends constantly towards the attainment of greater certainty of definition, and to the substitution of specific rules of conduct, instead of featureless generalities. It is always desirable that the standard by which parties are judged should be one of specific acts or omissions, with reference to the special circumstances of the case. It has been well said in Holmes' Lectures on the Common Law that "if, in the whole department of unintentional wrongs, the courts arrived at no further utterance than the question of negligence, and left every case,

without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they require the defendant to know, and would assert by implication that nothing could be learned by experience." Hence the long and growing line of decisions in which, instead of relying upon the vague and uncertain estimate of a jury as to the degree of care which would be exercised under the circumstances by a prudent man, there has been substituted the more precise and definite rule of certain specific acts, whose existence or omission constitutes negligence. The definition of negligence and the determination of a standard of duty is always a matter of law for the court. In case of a dispute it is, of course, for the jury to say whether or not the facts come within the standard. But where the facts are clear, and nothing remains but the definition and application to them of the rule of conduct, the responsibility is upon the court alone.

In the present case this responsibility was properly assumed and carefully discharged by the trial court. The conclusion reached by it is so well vindicated, and the case is so fully discussed in the opinion of the superior court (19 Pa. Super. Ct. 365) in affirmance of the court below, that little remains to be said. The accident occurred at a grade crossing in a populous district. The defendant company had provided safety gates and a watchman to protect travelers upon the highway. The train which caused the damage was running at a high rate of speed—probably 60 miles an hour—and the engineer was unable to stop in time to avoid the collision. The plaintiff's horses were smooth shod, and in approaching the crossing the team was stalled, so that, instead of passing at once and directly across the tracks, it remained upon the line of the railroad for about four minutes, until the train came. The watchman was not in any way at fault in permitting the driver and horses to enter upon the crossing when they approached, for there was ample time to have crossed and recrossed in safety, had the team proceeded in the ordinary way and with the usual celerity. Even after it was seen that there was some difficulty, it was not at once apparent that the wagon could not be moved in time to escape the coming of the train. As soon as there was cause to believe that a collision was imminent, every one in the vicinity seems to have done everything which it was reasonably possible to do to stop the train and avoid the accident. The evidence shows that the engineer, too, used his utmost efforts as soon as he saw and comprehended the danger. The accident was simply the result of an unusual and exceptional occurrence, viz., the stalling of the team upon the edge of the track, and its remaining there for some considerable time. The defendant company had sought to make it safe for the public to cross its tracks at this point by providing safety gates and a watchman, and there was no failure in the use of the means thus

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1, nor any neglect of duty in connection therewith. upon the theory that its tracks would thus be kept and it acted upon that assurance, rather than upon the to stop its trains after coming in sight of the crossing reaching it.

and nothing in the evidence which would have warranted a verdict against the defendant, unless it is to be held that it was negligence, under the circumstances, to run trains in the vicinity at a speed of 60 miles per hour. Each of the tribunals which has had this case under consideration has reached the conclusion that, in the light of the present conditions and the popular demand, such a rate of speed cannot be considered negligent, when proper means are taken to protect the public who use the crossings in the ordinary course of travel. An examination of the decisions in Pennsylvania shows that they sustain these propositions: (1) There is no limit on the rate of speed at which a railroad company may run its trains through the open country and over the crossings of highways and roads, so long as the bounds of safety to patrons are not transgressed. *Reading, etc., R. Co. v. Ritchie*, 102 Pa. 417, 26 Atl. 105, 19 Pa. 563. (2) In cities, towns, and populous districts, the speed of trains must be moderated, or else the railroad company must take reasonable precautions to make it safe for the public to have occasion to cross its tracks. *Phila. & Reading R. Co. v. Long*, 75 Pa. 257; *R. Co. v. Ritchie*, supra; *Ellis v. Shore, etc., Ry. Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. 914; *Childs v. Penna. R. Co.*, 150 Pa. 73, 76, 24 Atl. 1; *L. V. R. Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 1. The conclusion which was reached by the trial court in this case would seem to follow naturally, that where a railroad has placed gates across a highway, and has stationed a guard there to protect travelers on the highway, it may run its trains at high speed at that point, even if it be within the limits of a municipality or in a populous district. Grade crossings are always obnoxious, as they are a constant menace to public safety, and their continued existence is much to be deplored. But this is not a question as to the establishment or regulation of a grade crossing. The conditions which existed at the place of the accident seem to be of long standing, although the growth of traffic and the demand for increased speed have probably added to the danger. We agree with the view taken by the trial court, and approved by the appellate court, that a high rate of speed is demanded of railroad companies by the traveling public, and that such a rate is sanctioned by the law, where the usual and proper means are taken to guard the crossings and make them reasonably safe for those desiring to use them. We can only suggest that this case presents another illustration of the wisdom of the law which prohibits, wherever it is possible to do so, the running of steam railroads at grade. So long as they are

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permitted to exist, even where, as here, all reasonable precautions to secure safety in the ordinary use of the crossing are taken, danger from sudden breakdown or other exceptional cause will always be present.

The assignments of error are overruled, and the judgment is affirmed.

ATLANTA RY. & POWER CO. v. MADDOX.

(*Supreme Court of Georgia, Feb. 11, 1903.*)

[43 S. E. Rep. 425.]

Personal Injuries—Pleading and Proof.

The petition alleging that there was a collision between the plaintiff's vehicle and a car of the defendant, which threw him upon the ground, injured his back, left leg, and hip, caused concussion of the spine, and inflicted other bruises and injuries upon his body, it was permissible to introduce evidence showing injury to plaintiff's urinary organs. *Central Railroad Company v. Mitchell*, 63 Ga. 173 (3).

Case at Bar.

The evidence authorized the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. W. Maddox against the Atlanta Railway & Power Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Payne & Tye, for plaintiff in error.

Westmoreland Bros., for defendant in error.

COBB, J. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

SEIFRED v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, June 2, 1903.*)

[55 Atl. Rep. 1061.]

Assignments of Error.

It is not proper on appeal to raise the same question by different assignments of error.

Accident at Crossing—Nature of Crossing—Opinion Evidence.

In an action against a railroad company for injuries at a grade crossing, where the evidence shows the nature thereof, opinion evidence that the crossing was dangerous was erroneously admitted.

Same—Flagman—Negligence.*

It is not negligence per se for a railroad company not to guard a

*See generally, *Huntress v. Boston, etc., R. Co.* (N. H.), 4 Am. & Eng. R. Cas., N. S., 257; *Hutcherson v. Louisville & N. R. Co.* (Ky.), 15 Am. & Eng. R. Cas., N. S., 846; *Missouri, K. & T. Ry. Co. of Texas v. Magee* (Tex.), 15 Am. & Eng. R. Cas., N. S., 186.

As to whether it is negligence per se to fail to comply with ordi-

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crossing with a flagman, but it is a fact to be considered in determining whether due care was exercised by the railroad.

Personal Injuries—Evidence—Life Tables.

Where the Carlisle Tables are admitted in an action to recover for personal injuries, it is insufficient for the court to state in its charge that the tables were some aid, but not conclusive, in determining the probable life of plaintiff, but all the circumstances affecting the probable duration of his life, as disclosed by the evidence, should be called to the attention of the jury.

Contributory Negligence—Question for Jury.

Evidence in an action for injuries at a grade crossing reviewed, and *held* that the question of plaintiff's contributory negligence was for the jury.

Instructions.

A request for an instruction is properly refused where it contains several propositions of law, some of which are bad.

Appeal from Court of Common Pleas, Snyder County.

Action by William P. Seifred against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Andrew A. Leiser, for appellant.

C. P. Ulrich and A. W. Potter, for appellee.

MESTREZAT, J. It is not the number of exceptions taken during the trial nor the number of assignments of error filed in this court that determines the importance of the cause or the merits of the appeal when the case reaches the appellate court. This suggestion has been made so often by this court that its repetition would seem useless were it not that occasionally counsel still seem to think it necessary to raise the same question by several different assignments of error. Here we have seven assignments, which raise but the single question of the competency of a witness to express an opinion as to the dangerous character of the crossing where the accident occurred. A like observation may be made as to the other assignments, and it is safe to say that of the 30 assignments of error filed in this case one-fifth of the number would have been adequate to raise all the questions presented by this record for our consideration. We make these suggestions with the hope that we may be relieved from an examination of an unnecessarily voluminous record, such as we have before us, should the next trial of this cause be followed by an appeal.

We think it was error to admit the opinion of witnesses to show that the crossing where the collision occurred was dangerous. The competency of such testimony is based upon

nances requiring flagmen at crossings, see note, 19 Am. & Eng. R. Cas., N. S., 319.

Admissibility of evidence of failure to keep flagman at crossing, in absence of statutory requirement, see Carrow v. Barre R. Co. (Vt.), 4 R. R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933.

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necessity. Where facts disclosed by the evidence give an adequate and intelligent description of the situation, opinion evidence is not admissible. Here there can be no difficulty in placing before the jury by proper evidence the exact situation of the crossing and its approaches, so that the jury will be enabled to determine with equal correctness as the witness the character of the crossing. The testimony produced on the trial shows the number of tracks, the manner in which they cross the highway, the frequency with which and the purpose for which they were used by the railroad, the cars standing on the track at the time of the accident, the buildings, trees, etc., along the approaches which obstruct the view of an approaching train; in a word, every fact which a juror could know by personal inspection of the premises, and which would qualify him to testify as a witness. The jury, therefore, would have the same information and knowledge of the situation, and be as competent and capable of forming an opinion as to the dangerous character of the crossing, as any witness who might be called to the stand. No special knowledge or training was necessary to qualify a witness or juror to determine whether the crossing was dangerous or not, and, a full and adequate description of the circumstances and situation having been given by the witnesses, there was no necessity for opinion evidence on the subject, and its admission was error.

The learned trial judge charged, *inter alia*, as follows: "If this crossing was not a more than ordinarily dangerous crossing, then the sounding of the bell and blowing of the whistle was sufficient notice, and the company would not be to blame for not having a watchman or flagman at that point; and, if the whistle was blown and the bell was rung as the engine approached the crossing, they have done their full duty at this point, if you find in addition that it was not a dangerous crossing." This was clearly misleading and erroneous, and was not cured by any other part of the charge. In effect, the court said to the jury, if the crossing was dangerous, it was negligence *per se* for the company not to guard it with a flagman or watchman. As suggested by counsel, all railroad crossings are more or less dangerous, and are so regarded. The jury therefore was told by the court that the failure to furnish a flagman or watchman at the place of the accident was negligence. The learned judge may not have intended to say this to the jury, but such was clearly the effect of that part of the charge just quoted. On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing

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with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances. Says Clark, J., in *Lehigh Valley Railroad Company v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238: "The law does not designate the mode in which these precautions against injury on part of the company (at crossings) are to be exercised. There is, it may be conceded, no common-law duty on part of the company to station flagmen or to maintain gates at public grade crossings, unless, indeed, under the particular circumstances, the public safety cannot otherwise be reasonably secured. But the fact that flagmen are not stationed at such a crossing and that gates are not there maintained are matters proper to be considered, with other facts, in a given case, in determining the rate of speed which is reasonably consistent with the public safety." The twelfth and thirteenth assignments of error must be sustained.

From the charge and his answer to points we are satisfied that the learned trial judge intended to instruct the jury that compensation was the measure of damages. Some of the language used in the charge on the subject may be open to criticism, but, if so, on another trial this fault may be avoided. The rule as to the measure of damages in cases of this character is so well established by a long line of decisions that it need not be repeated here.

Having admitted the Carlisle Tables to show the expectancy of life of the plaintiff, the learned trial judge should have more carefully guarded the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. As said in *Steinbrunner v. Pittsburg, etc., Railway Company*, 146 Pa. 504, 23 Atl. 239, 28 Am. St. Rep. 806: "Their value, where applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned." It is not sufficient to say, as the court did, that the tables were some aid, but not conclusive, in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence, or concerning which there was testimony, should have been called to the attention of the jury. Unless this is done, and in a very pointed and direct way, by the court, mortality tables are very likely to have more weight with the jury than should be given evidence of that character.

Under the evidence, the plaintiff's negligence, like that of the defendant's, was a question for the jury. He did not drive recklessly nor carelessly in front of a moving locomotive, if his evidence is believed. *Carroll v. Penna. R. R. Co.*, 12 Wkly. Notes Cas. 348, and kindred cases, therefore,

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are not applicable to the facts disclosed by the evidence in this case. The jury would have been justified in finding that the plaintiff did what the law exacted of him, and stopped, looked, and listened for an approaching train before he attempted to cross the defendant company's tracks. He testified that the point at which he stopped was between 60 and 70 feet from the track, and "was the best place I could get to look through." The view eastward, from which the train approached, was somewhat obstructed; but he says that at that point there was an open space of 60 feet, through which he could see in an easterly direction the railroad tracks. "I looked out through there," he says, "and there was nothing to be seen ahead of me, and I thought I could drive across." He had passed safely over two tracks, and his horse was beyond the third track when his vehicle was struck and he was injured. The facts thus disclosed were sufficient to send the case to the jury on the question of the plaintiff's negligence. It was argued by counsel for the appellant that it "is conclusively shown by the fact of the collision itself and by the testimony of disinterested eyewitnesses that Seifred did not, in truth, stop at all," and the appellant's testimony to sustain the argument is quoted at length in the printed brief. But this argument, like the testimony, was for the jury, and not for this court. There was testimony introduced by the plaintiff, if believed, to warrant a finding that he did stop, look, and listen at a place where he could see an approaching train. The fact that the view in the direction in which he looked was not entirely unobstructed does not convict him of stopping in the wrong place. There he could see, and it was his duty to stop at that point, and to use the opportunity thus given him to prevent a collision by looking and listening for an approaching train. This he did.

The defendant's counsel embodied in some of his requests for instruction several propositions of law, some good and others clearly not. The learned trial judge was therefore right in refusing them. A point should contain but a single legal proposition, and be so constructed that the trial court can answer it by a simple affirmation or negation.

Such matters as inadvertently crept into the case during the trial, and are complained of here, will doubtless not appear in the next trial, and need not receive any special attention at this time.

The judgment of the court below is reversed, and a *venire facias de novo* is awarded.

SIMPSON *v.* ENFIELD LUMBER CO.*(Supreme Court of North Carolina, Sept. 29, 1903.)*

[45 S. E. Rep. 469.]

Fires Set by Locomotive—Combustibles on Right of Way—Logging Roads—Liability.*

A company operating a private railroad constructed for the purpose of removing timber conveyed to it is liable to the owner of the land for damages to his timber from fires caused by sparks from its engines igniting combustible material, negligently permitted to accumulate on its right of way, to the same extent as a public railroad company.

Same—New Cause of Action—Pleading—Amendment.

Where, in an action against a railroad company, the original complaint alleges that the burning of plaintiff's timber was caused by the negligence of defendant's servants, or by reason of the defective construction of its engines, an amendment averring that defendant carelessly permitted fire to be communicated from its engine to combustible material negligently permitted to accumulate along its right of way, and that defendant negligently failed to provide its engines with proper spark arresters to prevent the escape of sparks, does not state a new cause of action.

Same—Combustibles on Right of Way—Negligence—Evidence.

In an action for damages by fire alleged to have been communicated by sparks escaping from defendant's engine to combustible material allowed to accumulate on the right of way, and to plaintiff's land, evidence showing the construction of the road through the woods, without the removal of any underbrush except sufficient to allow the train to pass, and the presence of fire on the right of way immediately after the passing of a train, is sufficient to require the submission of the question of defendant's negligence to the jury.

Montgomery, J., dissenting.

On petition for rehearing. Affirmed.

For former opinion, see 42 S. E. 939.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at August term, 1902, and is reported in 131 N. C. 518, 42 S. E. 939. This court then held that the motion to nonsuit should have been granted, as the defendant, to whom the plaintiff had sold certain timber on

*As to negligence in permitting combustibles to accumulate on a railroad right of way, see *Cratt v. Albemarle Timber Co.* (N. Car.), 7 R. R. R. 84, 30 Am. & Eng. R. Cas., N. S., 84; *Livermon v. Roanoke & T. R. Co.* (N. Car.), 5 R. R. R. 506, 28 Am. & Eng. R. Cas., N. S., 506; *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo.), 2 R. R. R. 412, 25 Am. & Eng. R. Cas., N. S., 412; note, 15 Am. & Eng. R. Cas., N. S., 495; *Richmond v. McNeill* (Ore.), 10 Am. & Eng. R. Cas., N. S., 691; *Bateman v. Peninsular Ry. Co.* (Wash.), 12 Am. & Eng. R. Cas., N. S., 678; *Waters v. Atlantic City R. Co.* (N. J.), 15 Am. & Eng. R. Cas., N. S., 525; *Watt v. Nevada Central R. Co.* (Nev.), 3 Am. & Eng. R. Cas., N. S., 659; *St. Louis & S. F. Ry. Co. v. Ludlum* (Kan.), 23 Am. & Eng. R. Cas., N. S., 851; *Shields v. Norfolk & C. R. Co.* (N. Car.), 22 Am. & Eng. R. Cas., N. S., 635; *Boston Excelsior Co. v. Bangor & A. R. Co.* (Me.), 16 Am. & Eng. R. Cas., N. S., 654; *Pittsburg, C., C. & St. L. Ry. Co. v. Indiana H. Co.* (Ind.), 18 Am. & Eng. R. Cas., N. S., 83; *New York, P. & N. R. Co. v. Thomas* (Va.), 4 Am. & Eng. R. Cas., N. S., 240; *Missouri, etc., Ry. Co. v. Lycan* (Kan.), 6 Am. & Eng. R. Cas., N. S., 781.

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his land with the right to cut the same and to build a railroad on the land for the purpose of removing it, was not liable to the plaintiff for any damage caused by a fire communicated by its engine, if properly equipped and operated, to combustible material negligently permitted to accumulate on or along its track, and thence to the plaintiff's timber, which was destroyed by fire. In *Cratt v. Timber Co.*, 132 N. C. 151, 43 S. E. 597, we had occasion to again consider the principle upon which the former decision in this case was based, and we held, overruling the case now under consideration, that upon such a state of facts as above set forth the defendant is liable, and we still adhere to the latter decision. We deem it sufficient, therefore, merely to refer to the case of *Cratt v. Timber Co.*, supra, for the reasons upon which we rely in this case to sustain the ruling that the defendant is liable, if, as found by the jury, it negligently permitted inflammable material to accumulate on or along its roadbed, which was set on fire by sparks or burning coals dropped from its engine, the fire being thence communicated to the plaintiff's timber, which was destroyed.

Having thus decided with respect to the defendant's general liability, it follows that the petition to rehear must be allowed, the former decision reversed, and the defendant's exception to the refusal of the court below to dismiss the action overruled. It then becomes necessary to consider the questions raised by the defendant's other exceptions.

The action was brought to recover damages for negligently burning timber on the plaintiff's land. It appears that on the 6th day of April, 1900, the plaintiff sold to the defendant all the timber of a certain size, when cut, on his tract of land, and executed a deed therefor, granting to the defendant the right to "construct, maintain, and use such roads, tramways, railways, etc., as it may deem necessary for cutting and removing said timber." The defendant under this deed entered upon the land, constructed and used certain railways, and cut and removed the timber and hauled the same away over the said railways, using as a motive power a steam railway engine. On the 14th day of September, 1900, after the defendant had cut and removed all of the timber which it had bought, a fire destroyed the remainder of the standing and growing timber on the land; the plaintiff alleging that this fire was caused by the negligence of the defendant in allowing rubbish and combustible material to remain on its roadbed while it was operating its steam engine over the same. The plaintiff in his original complaint alleged that the burning of the timber was caused by "the negligence of the defendant's agents and servants, or by reason of the defective construction of its engines" which it operated on its railway. Afterwards the plaintiff asked and obtained leave to amend his complaint, as follows: "That on or about the 14th day of September, 1900, the defendant did negligently and care-

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to be communicated from its engine, which spread over and upon said land for the purpose of cutting timber purchased as aforesaid, to the plaintiff's land, and other dry and combustible matter which the defendant had negligently allowed to grow, relate upon and along its said track and right of way, which spread and burned over the plaintiff's land, destroying large quantities of oak and undergrowth thereon, to the plaintiff's damage of several hundred dollars; that at said time, as the plaintiff believes, the defendant carelessly and negligently failed to provide its engine with proper spark arrester or proper appliances to prevent the escape of sparks, and thus did negligently and carelessly set fire to the plaintiff's land, caused the plaintiff's damages as above set forth, and the defendant in apt time objected to the allowance of the same. The objection was overruled, and the verdict was affirmed.

It is held that the amendment was not proper. It is held that the defendant that by it a new cause of action was introduced into the complaint, which was a departure from the original cause of action. The cause of action was the negligent burning of the plaintiff's land, and it was not the negligence of the defendant. The plaintiff to allege different acts of negligence, the negligence was committed in different places, and of a different scope and purpose of this action, or what led to the gravamen or the grievance or injury sustained, was not changed by the amendment. No difference, with respect to the plaintiff's damages, whether the burning was caused by a defect in the engine or by the defendant's negligence in setting on fire combustible material carelessly on its right of way. Amendments which merely amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and a statement of the cause of action may be narrowed, amplified, or fortified in varying forms to meet the facts in which the pleader may anticipate its disproof or evidence. 1 Enc. Pl. & Pr. 557-562. It has been held to be a fair test, in determining whether a new cause of action is alleged in an amendment, to inquire whether the amendment upon the original complaint would be a bar to the amendment (Id. 556), or whether the amendment could have been cumulated with the original complaint (Richardson v. Fenner, 10 La. Ann. 599). If, when applied to this case, the amendment was proper, it would be a bar to the original complaint. In suit founded on negligence, allegations of facts to establish the same general acts of negligence may properly be added by amendment. 1 Enc. Pl. & Pr. 557. See also *Had v. Kitchins*, 83 Ga. 83, 9 S. E. 827. An amendment will not be allowed under our law when it does not change the claim or defense (Code 1883, § 273),

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and the statement of additional grounds of negligence is not a new cause of action or a substantial change of the plaintiff's claim (*Kuhns v. Railroad*, 76 Iowa, 69, 40 N. W. 92; *Davis v. Hill*, 41 N. H. 329; *Railroad v. Salmon*, 14 Kan. 512; *Smith v. Bogenschutz* [Ky.] 19 S. W. 667; *Nash v. Adams*, 24 Conn. 33; *Carmichael v. Dolen*, 25 Neb. 335, 41 N. W. 178; *Railroad v. Hendricks*, 41 Ind. 48; *Chapman v. Nobleboro*, 76 Me. 427). The amendments allowed in the cases just cited were not unlike the one which was made in this case. In the case of *Smith v. Bogenschutz*, supra, it was held that a complaint which alleged that a certain injury, caused by the overflow of molten iron from a ladle in which it was being carried, was due to the jostling of the carriers in a narrow passageway, could be amended so as to allege that the overflow was due to a defect in the ladle without introducing any different cause of action. We do not see how our case can be distinguished from *Smith v. Bogenschutz*, which was well considered.

The case of *King v. Dudley*, 113 N. C. 167, 18 S. E. 110, seems to be directly in point. There the plaintiff asserted title to a crop as lessee of a receiver, and after the evidence, or a portion of it, had been introduced, she was permitted to amend her complaint by alleging that the crop was grown on land of her deceased husband, which was cultivated by her in lieu of her dower, and that the crop belonged to her. The court held that the amendment was properly allowed, as it did not set up a cause of action wholly different from that alleged in the original complaint, or change the subject-matter of the action, though it did state a title entirely different from the one alleged in the original complaint. The cause of action was for the recovery of the crop, and it could make no difference how she claimed it, provided she established a good title. We think, therefore, that the amendment was properly allowed.

The defendant, at the close of the plaintiff's testimony, moved to dismiss the action, or for judgment as in case of nonsuit, upon the ground that there was no evidence of negligence, and, the motion being overruled, the defendant introduced testimony. At the close of all the testimony, the defendant renewed the motion to dismiss upon the same ground, and also requested the court to charge the jury that, if they believed from the evidence that the burning of the timber was not caused by the negligence of the defendant, the jury should therefore answer the first issue "No." The motion to dismiss having been denied, and the prayer for instruction refused, the defendant excepted to each ruling. These two exceptions present the question whether there was sufficient evidence to be submitted to the jury upon the question of negligence.

The plaintiff at the trial introduced as a witness Candace Williams, who testified as follows: "My house is about 200

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ack, and the track can be seen was cut down, and just place o along, and then they put down at any way. There was nothing hey just put the trees and brush ould go along. They never raked cross-ties right on top of it, all The fire was Wednesday after the er. It was the last day the three he evening, when the train went ame. There was a fire just a little was coming out, and went out to ew it would burn me up. The train y house, going on out. I saw the ods when the train came out. Two and the train, right at the track from. Just as the train came out, kes right up behind the train, and I and said, 'Yonder are two smokes ..' They rose up behind the train, : track, so that they could not cross it n cross-examination she stated: "It d. I saw the smoke when it rose right s right there, and it looked like the st by the ties. There were some fires dn't come any fire in there before the When the train ran along, there was a ad."

to state all the testimony of the wit- Candace Williams testified at length on n as to how the fire originated, and she ng and rigid cross-examination. It is ass upon the credibility of this witness. elieved her, and we can only say upon ent of her testimony that there was at tending to show that the burning of the as caused by the defendant's negligence orth in the complaint.

ag since adopted the rule that "where the age resulting from the defendant's act, e exercise of proper care, does not ordi- nage, he makes out a prima facie case of cannot be repelled but by proof of care or nary accident which renders care useless." ad, 89 N. C. 321; Lawton v. Giles, 90 N. C. ailroad, 54 E. C. L. 228; Cratt v. Timber 51, 43 S. E. 597; Ins. Co. v. Railroad, 132 2. 548. In Aycock v. Railroad, 89 N. C. 329. gh Smith, C. J., says: "A numerous array of in the note (2 A. & E. R. R. Cases, 271) in side of the question as to the party upon

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whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in the case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpatory circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and, if you are not in default, show it, and escape responsibility.' "

We have considered at length the two exceptions that were pressed in argument before us. Other exceptions were taken by the defendant, but after a most careful examination of them we think they are without merit.

The former judgment of this court is reversed, and the judgment below is affirmed. Petition allowed, and judgment below affirmed.

MONTGOMERY, J., dissents. CONNOR, J., having been of counsel, did not sit on the hearing of this case.

DOUGLAS, J. (concurring). I concur in the opinion of the court, but as my reasons are fully set out in my dissenting opinion filed at the first hearing of this case, reported in 131 N. C. 523, 42 S. E. 939, it is needless to repeat them. The issues of fact were properly left to the jury, as there was evidence tending to support the plaintiff's contentions.

O'BRIEN v. WISCONSIN CENT. RY. CO.

(*Supreme Court of Wisconsin, Sept. 8, 1903.*)

[96 N. W. Rep. 424.]

Accident at Crossing—Lookouts—Obstructed View—Negligence.

Where, in an action for death at a railroad crossing, the engineer was on the lookout on his side of the train all the time as they approached the crossing, but by reason of a curve at that point could not see plaintiff's intestate, the mere fact that the fireman, in pursuance of his duties, got down from his side of the engine to the deck, where he could not look ahead, did not constitute negligence on the part of the company.

Same—Speed—Gates—Statute.

Rev. St. 1898, § 1809, declares that no train or locomotive shall go faster than six miles per hour in any city or village until it has passed all the traveled streets thereof. Section 1809a provides that railways were thereby relieved from slowing down trains in cities and villages to six miles an hour, on condition that some adequate security should be afforded, not to exceed a speed of 15 miles per hour, and provided that gates should first be placed and maintained on such street crossings within cities and incorporated villages over which trains passed as the public authorities thereof might direct:

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ould be construed together, and required a
an incorporated city to operate its trains
e no gates had been erected at not to ex-

egligence.*

e is not chargeable with contributory neg-

ants—Question for Jury.

his supper, went into his back yard to pre-
s followed by his son, 25 months of age.
ged in splitting the wood, the child left,
house, through the front gate, and out onto
a short distance across defendant's railway
son turned, and started to return. Plaintiff,
child was gone, dropped the wood, and ran
was struck by a train before plaintiff could
whether plaintiff was guilty of contributory
g proper care of the child was a question for

uit Court, Ashland County; John K.

O'Brien, as administrator of the estate
ceased, against the Wisconsin Central
From a judgment in favor of defendant,
eversed.

recover damages for the alleged negligent
ff's infant son June 18, 1901, at a street
of Ashland. Issue being joined and trial
e close of the testimony directed a verdict
endant, and from the judgment entered

g children can be chargeable with contributory
v. North Jersey St. R. Co. (N. J.), 7 R. R. R.
R. Cas., N. S., 654 (seven years); Eskildaen
(sh.), 7 R. R. R. 549, 30 Am. & Eng. R. Cas.,
); Missouri, K. & T. Ry. Co. of Texas v. Scar-
R. R. 608, 26 Am. & Eng. R. Cas., N. S., 608;
v. Hamer (Ind.), 2 R. R. R. 9, 25 Am. & Eng.
en years); Edgington v. Burlington, C. R. & N.
t. R. 249, 27 Am. & Eng. R. Cas., N. S., 249
(years); Chicago City Ry. Co. v. Tuohy (Ill.), 4
Eng. R. Cas., N. S., 1 (under seven years);
v. Jernigan (Ill.), 5 R. R. R. 535, 28 Am. &
535 (under seven years); Citizens' St. R. Co.
t. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9
as, 20 Am. & Eng. R. Cas., N. S., 299, 322;
Cas., N. S., 95; 13 Am. & Eng. R. Cas., N.
ig. R. Cas., N. S., 755; 19 Am. & Eng. R. Cas.,
; on turntables); Anderson v. Union Terminal
m. & Eng. R. Cas., N. S., 834 (nine years);
Trunk Ry. Co. (Mich.), 20 Am. & Eng. R.
(seven years); Illinois Cent. R. Co. v. Wil-
. & Eng. R. Cas., N. S., 644 (nine years);
Pac. Ry. Co. (Mo.), 20 Am. & Eng. R. Cas.,
s); Tully v. Philadelphia, W. & B. R. Co. (Del.),
Cas., N. S., 322 (eight years); Lemasters v.
(Cal.), 20 Am. & Eng. R. Cas., N. S., 299 (seven-
v. Southern Ry. Co. (S. Car.), 19 Am. & Eng.
(sixteen months).

O'Brien v. Wisconsin Cent. Ry. Co

thereon the plaintiff brings this appeal. The negligence alleged is the excessive speed of the train, and the failure to keep a lookout in the direction in which the train was going at the time. It appears, and is undisputed, that the defendant's passenger depot is within the city limits; that the defendant's line of railway from that city to Chicago at first runs directly east for seven blocks to Sixth Avenue East; that just before crossing that avenue it begins to turn to the southeast, and continues to do so until after crossing Seventh Avenue East; that on the evening in question the defendant's regular passenger train for Chicago left the depot at 7:25 p. m., and when it reached Seventh Avenue East it ran over the child, and injured it, so that it died the next morning. There is evidence tending to prove that the plaintiff was a laboring man, 39 years of age; that he lived with his family, consisting of his wife and three children, on the west side of Seventh Avenue East, and in the second house immediately south of the railway track; that he came home from his work at half past 6 o'clock; that after he had his supper, he went back of the house to an alley, 150 feet from his front gate, to prepare some wood, and little Johnny, then 25 months of age, went with him; that while the plaintiff was engaged in splitting wood, Johnny left his father, and went to the front of the house, through the front gate, out upon the avenue sidewalk, thence north on the sidewalk across the defendant's railway track to a point some distance north of the track, when he turned around, and went back south along the same sidewalk, and that as he was attempting to cross the railway track, he was struck by the train, and so injured that he died the next morning; that when the plaintiff was in the act of carrying an armful of wood into the kitchen, he missed the child, and so dropped his wood, and looked in front, and saw the child, then 20 to 25 feet north of the track, running along the sidewalk toward the track, and he immediately started on the run for the child with all his speed, but the train got to the child first; that when he first discovered the child, he was 140 feet from him on the line he went, and that the train at that instant was 225 feet from the child. It is practically undisputed that the engineer kept a lookout on his side of the train all the time as it approached Seventh Avenue East, and could see the track and south of it, but could not see north of the track by reason of the curve in the track; that just before reaching Sixth Avenue East, the fireman, whose place was on the north side of the cab, got down on the deck, and pulled the door open, and reached over with his left hand for the injector, to keep the engine from blowing off, and so could not see the track as the train approached Seventh Avenue East; that the roundhouse foreman, who happened to be riding in the cab to his place of business, about a mile from the depot, and when the engine was about at the alley mentioned, looked through the front cab door, and saw the little child 30 to 35

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feet north of the center of the track, walking north on the sidewalk, away from the track; that he then turned around to speak to the engineer, who failed to hear him, when he again looked ahead, and saw the child, then about 15 or 20 feet from the track, running toward it; that he immediately called to the engineer, who turned his head in through the window, set the brake, and reversed the engine just as soon as he possibly could, and the train was stopped as soon as possible; that the automatic air bell was ringing all the time.

Dufur & Alvord, for appellant.

Howard Morris and Thos. H. Gill, for respondent.

CASSODAY, C. J. (after stating the facts). We cannot say that there was any error in refusing to submit to the jury the question whether the defendant was negligent in failing to keep a lookout in the direction in which the train was going at the time. The facts are given in the foregoing statement. The engineer was on the lookout on his side of the train all the time as they approached Seventh avenue. The mere fact that the fireman, in pursuance of the requirements of his duties, just before reaching that avenue, got down on the deck, where he could not look ahead, cannot be regarded as negligence, under the circumstances stated.

2. But there is evidence tending to prove that the train was at the time going at the rate of more than six miles per hour. The statute declares, in effect, that "no train or locomotive shall go faster" in any city or village "than at the rate of six miles per hour," until it has "passed all the traveled streets thereof." Section 1809, Rev. St. 1898. But counsel for the defendant contend that the next section of the statute makes an exception to the general rule, and permits a speed of 15 miles an hour, and only requires gates to "be placed and maintained upon such street crossings" when directed by the city or village authorities (section 1809a, Rev. St. 1898); in other words, that the statute authorized a speed of 15 miles an hour without gates, but simply required railway companies to construct gates when directed to do so by the city or village. In support of such contention, counsel seem to rely upon *Nolan v. M. L. S. & W. Ry. Co.*, 91 Wis. 16, 22, 23, 64 N. W. 319. It was there held that the statute had no application to unincorporated villages, but it was there said, in effect, by our late Brother Pinney, that the two statutes must be construed together; that the act from which the last section was taken is entitled "An act to limit the rate of speed of railroad trains and locomotives in incorporated villages and cities" (Laws 1891, p. 676, c. 467); that railway corporations were thereby relieved from slowing down all trains in cities and villages to six miles an hour, "on condition that some adequate security should be afforded in the case of an increased rate of speed to fifteen miles an hour, and to that end it was provided," among other things, in the

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language of the statute, "that gates shall first be placed and maintained upon such street crossings within cities and incorporated villages over which trains shall pass, as the public authorities of any such city or village may direct." Certainly, the opinion of Mr. Justice Pinney does not bear the construction placed upon it by counsel. But it is unnecessary to discuss the question as to the meaning of the sections of the statutes cited, since it is fully covered by the opinion of Mr. Justice Dodge in the recent case of *Schroeder v. Wisconsin Cent. Ry. Co.*, 93 N. W. 837, 840, 841. It was there expressly "held that the two statutes should be construed together, and required a railroad passing through an incorporated city to operate its trains over street crossings at not to exceed six miles per hour where no gates had been erected, as authorized by the latter section." The evidence was certainly sufficient to take the case to the jury on the question whether the train was at the time running at an unlawful rate of speed. For the purpose of this appeal, we must assume that it was running at an unlawful rate of speed.

3. This being so, we cannot say, as a matter of law, that such unlawful rate of speed was not the proximate cause of the injury and death of the child. Of course, a child of such tender years is not chargeable with contributory negligence. If it is claimed that the parents were, that would, at least, be a question for the jury. *Hoppe v. C. M. & St. P. Ry. Co.*, 61 Wis. 357, 21 N. W. 227; *Hooker v. C. M. & St. P. Ry. Co.*, 76 Wis. 542, 44 N. W. 1085. The liability of a railway train running over pedestrians, and especially children, in cities and villages, is, of course, much greater than in the country. The object of the statutes so limiting the rate of the speed of trains in cities and villages was to prevent such injuries. The question of proximate cause was properly for the jury, under appropriate instructions from the court.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SIEBECKER, J., took no part.

BLAUVELT v. DELAWARE, L. & W. R. Co.

(*Supreme Court of Pennsylvania, May 11, 1903.*)

[55 Atl. Rep. 857.]

Accident at Crossing—Due Care on Part of Deceased—Presumptions.*

The evidence of plaintiff in an action to recover for death of intes-

*As to the presumption of due care on the part of person killed, see foot-note appended to *Waldron v. Boston & M. R. R.* (N. H.), 7 R. R. R. 54, 30 Am. & Eng. R. Cas., N. S., 54; *Northern Pac. Ry. Co. v. Spike* (C. C. A.), 7 R. R. R. 749, 30 Am. & Eng. R. Cas., N. S., 749; notes, 13 Am. & Eng. R. Cas., N. S., 800; 10 Am. & Eng. R. Cas., N. S., 584; *Louisville & N. R. Co. v. Clark* (Ky.), 12 Am. & Eng. R. Cas., N. S., 407; *Crawford v. Chicago G. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 628; *Weller v. Chicago, M. & St. P. Ry. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 61; Cam-

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tate killed at a grade crossing tending to show that the night was so dark that the engine running backwards could not be seen, that the signals could not be seen, and that it carried no light, and could not be heard by one on the crossing, raised the presumption that the deceased did his duty by stopping, looking, and listening before crossing.

Death by Wrongful Act—Damages.

In an action by a mother for wrongful death, where the relation between plaintiff and deceased is shown, plaintiff may also show any pecuniary loss suffered by the death of her son.

Evidence.

Where the data on which certain general computations were based were in evidence, the exclusion of the computations made by a witness were proper.

Cross-Examination.

Where a witness has testified in general as to matters material to the issue, he was properly cross-examined in regard thereto.

Appeal from Court of Common Pleas, Susquehanna County.

Action by Palmira Blauvelt against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that the deceased was a man 30 years old, and that he lived with his mother, and helped to support her. The statement of claim stated the relationship between the parties. When the plaintiff was on the stand the following offer was made: "Mr. Sherwood: We offer to prove, as to this branch of the case, the services which the son performed for his mother at the time he was living there with her and up to the time of his death, and the different characters of the services, for the purpose of showing the amount of damages she has sustained by his death. Mr. Warren: We object to it as incompetent. (Objection overruled. Defendant excepts. Bill sealed for defendant.) A. Why, he done everything; cutting wood and working around and helping me around the house, and everything that he could do; going after the cow and feeding hogs; and everything, when he was around the house, and taking care of the girl that is sick." A witness of the defendant was asked as follows: "Q. If a train were going twenty miles an hour, what would be the number of seconds that it would require to pass over the space from the whistling post at the south to this crossing? (Objected, as a matter of mere com-

eron v. Great Northern Ry. Co. (N. Dak.), 12 Am. & Eng. R. Cas., N. S., 520; Louisville & N. R. Co. v. Milliken (Ky.), 14 Am. & Eng. R. Cas., N. S., 742; Hook v. Missouri Pac. Ry. Co. (Mo.), 21 Am. & Eng. R. Cas., N. S., 787; Evansville Street R. Co. v. Gentry (Ind.), 5 Am. & Eng. R. Cas., N. S., 500; Dalton v. Chicago, R. I. & P. Ry. Co. (Iowa), 21 Am. & Eng. R. Cas., N. S., 460; McVey v. Chesapeake & O. Ry. Co. (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788; Dyer v. Fitchburg R. Co. (Mass.), 11 Am. & Eng. R. Cas., N. S., 473; Norfolk & W. Ry. Co. v. Cromer (Va.), 23 Am. & Eng. R. Cas., N. S., 720.

Presumption of due care of deceased drover who jumped from train to avoid danger, see Western Maryland R. Co. v. State (Md.), 6 R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904.

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putation.) The Court: It seems to me that is a question of mere computation. (Objection sustained. Defendant excepts. Bill sealed for defendant.) Q. Please tell us at what rate of speed—that is, how many feet per second—a train would go on the track at the rate of twenty miles per hour, and also at the rate of twenty-five miles per hour. (Objected to the same as before. Objection sustained. Defendant excepts. Bill sealed for defendant.)” Orland Taylor was asked as follows: “Q. Did you have any conversation with him [Miller, the engineer] in which he said that the chimney of this light was smoked up, and that he went out and wiped it off? Mr. Warren: We object that this is not a contradiction on material point, nor as to the time of the accident, and that it is incompetent and immaterial. (Objection overruled. Defendant excepts. Bill sealed for defendant.)”

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Everett Warren, Warren & Knapp, and A. H. McCollum, for appellant.

Paul J. Sherwood and Ralph B. Little, for appellee.

MESTREZAT, J. This case was most carefully and patiently tried by the learned judge of the court below. It was submitted to the jury in a charge impartial, exceptionally clear, and exhaustive. The negligence of the defendant company and that of the deceased were the questions presented for the consideration of the jury, and were determined in favor of the plaintiff. The defendant filed 29 reasons for a new trial, all of which were carefully considered, and dismissed by the learned trial judge in an opinion which fully vindicates his conclusions. We now have this appeal, in which the learned counsel for the appellant company asks us to review practically the same questions determined against it on the motion for a new trial. Notwithstanding the 29 assignments of error, and the exhaustive argument in support of them, we are not convinced that the court below committed any reversible error in the trial of the cause.

The principal complaint of the defendant company is that the court erred in not affirming its first point that “upon the whole case the verdict must be for the defendant.” Binding instructions in favor of the defendant would have been manifest error under the testimony in the case. John Blauvelt, the deceased, and his companion, each riding a horse, were struck and killed by a light passenger engine with tender, running backward on a descending grade, about 10:30 o’clock of a very dark night, at a public crossing in the borough of La Plume, in Susquehanna county. No witness saw the men as they approached the crossing or at the time they met their death. The plaintiff contended and introduced evidence on the trial to show that the night was so dark that the engine approaching the crossing could not be seen; that it gave no warning by whistle or bell of its approach; that it

carried no lights that could be seen by a person approaching the crossing; and that it ran so noiselessly that it could not be heard by any one on the highway as he came to the crossing. The defendant company claims that the evidence in support of these negligent acts was of a negative character, and "of little or no probative effect," and should have been withdrawn from the jury. But this is clearly erroneous. An examination of the evidence satisfies us that it was ample, if believed, to sustain the plaintiff's contention, and hence it was the duty of the court below to submit it to the jury.

It is very strenuously urged by the appellant that Blauvelt's death was caused by his own negligence. It is conceded that, in the absence of any evidence showing the contrary, the presumption is that he did do his duty as he approached the crossing by stopping, looking, and listening. But it is contended that the circumstances and facts attending the collision, as disclosed by the evidence, clearly rebut the presumption that he did exercise proper care on the occasion, and that they show that by reason of intoxication, or some other cause, he disregarded or neglected the duty required of him, and thereby caused the collision which resulted in his death. It is claimed by the appellant that the road which Blauvelt traveled ran parallel with and near the defendant company's railroad, and that after he left it and turned to cross the tracks of the railroad his view in the direction in which the engine was coming was unobstructed for a long distance. It is also claimed that there were several lights on the engine and tender, which he could have seen, and presumably did see, if he looked. In addition to these alleged facts, which it is claimed were sufficient warning to Blauvelt of the approach of the engine, it is further urged that, had he exercised his sense of hearing, as he was required to do, he must necessarily have heard the noise of the locomotive as it neared the crossing. These matters, it is argued, conclusively rebut the presumption that Blauvelt performed his duty to stop, look, and listen as he approached the crossing. The difficulty with this contention is, however, that the plaintiff denies the existence of the alleged facts set up by the defendant company in support of its position. The evidence on the part of the plaintiff tends to show that there were no gates or guards at the place of the accident, that the engine approached the crossing noiselessly, and without any lights on it or the tender that could be seen a sufficient distance to warn the deceased of its approach to the crossing. If these allegations were true—and the jury must have so found—there was nothing in the case to overcome the presumption that Blauvelt was in the exercise of due care at the time he was killed. Like the defendant's negligence, this was a question for the jury under the evidence, and was submitted with proper instructions by the trial judge.

It was not error to permit the plaintiff, who was the mother of the deceased, to show what loss pecuniarily she had sus-

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tained in the death of her son. This was the effect of the testimony offered for the purpose, and the court charged that that would be the measure of damages. The assignments relating to the exclusion of the testimony offered to show facts ascertainable by mere computation cannot be sustained. The data which the witness had on which the computations were based were in evidence, and the jury could make the calculations as well as the witness.

Miller, a witness for the defendant company, had testified in chief to matters material to the issue, and hence his cross-examination relative thereto was proper. It was also competent for the plaintiff to contradict his answers.

We have not deemed it necessary to consider the numerous assignments of error seriatim. We are relieved from doing so by the full discussion of the case by the trial judge in his charge and opinion refusing a new trial. As correctly stated in the printed brief of the learned counsel for appellant, "in truth there is not much dispute over legal principles." The jury was the proper tribunal to determine the facts of the case, and having done so under proper instructions and with sufficient evidence to warrant the verdict, we must sustain the judgment entered by the court below.

The judgment is affirmed.

CENTRAL OF GEORGIA RY. CO. v. WOOLSEY.

(*Supreme Court of Georgia, June 27, 1903.*)

[45 S. E. Rep. 267.]

Injury to Stock—Evidence—Certiorari.*

The evidence on the trial now under review being in some mate-

*As to whether a presumption of negligence arises from the fact that stock is killed on a railroad track, see foot-note appended to *Alabama Midland Ry. Co. v. Stevens* (Ga.), 6 R. R. R. 568, 29 Am. & Eng. R. Cas., N. S., 568; *Kansas City, M. & B. R. Co. v. Henson* (Ala.), 1 R. R. R. 674, 24 Am. & Eng. R. Cas., N. S., 674; *Felton v. Anderson* (Ark.), 4 R. R. R. 114, 27 Am. & Eng. R. Cas., N. S., 114; *Illinois Cent. R. Co. v. Gholson* (Ky.), 1 R. R. R. 677, 24 Am. & Eng. R. Cas., N. S., 677; *St. Louis, etc., Ry. Co. v. Cline* (Ark.), 1 R. R. R. 500, 24 Am. & Eng. R. Cas., N. S., 500; notes, 5 Am. & Eng. R. Cas., N. S., 326; 11 Am. & Eng. R. Cas., N. S., 333, 851; 14 Am. & Eng. R. Cas. N., S., 30, 46; *Central of Georgia Ry. Co. v. Howard* (Ga.), 21 Am. & Eng. R. Cas., N. S., 15; *Georgia S. & F. Ry. Co. v. Sanders* (Ga.), 18 Am. & Eng. R. Cas., N. S., 206; *Alabama Mid. Ry. Co. v. Gassett* (Ga.), 5 Am. & Eng. R. Cas., N. S., 607; *Davis v. Florida Cent. & P. R. Co.* (S. Car.), 5 Am. & Eng. R. Cas., N. S., 324; *Keilbach v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 28; *Southern Ry. Co. v. Early* (Ga.), 12 Am. & Eng. R. Cas., N. S., 859; *St. Louis, I. M. & S. Ry. Co. v. Bragg* (Ark.), 14 Am. & Eng. R. Cas., N. S., 34; *McMillin v. Southern Ry. Co.* (Miss.), 14 Am. & Eng. R. Cas., N. S., 37; *Cantrell v. Kansas City, M. & B. R. Co.* (Miss.), 14 Am. & Eng. R. Cas., N. S., 30; *Central of Georgia Ry. Co. v. Wood* (Ga.), 11 Am. & Eng. R. Cas., N. S., 850; *Central of Georgia R. Co. v. Woolsey* (Ga.), 19 Am. & Eng. R. Cas., N. S., 573.

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rial particulars more favorable for the defendant in error than in the trial under review when the case was formerly here (37 S. E. 392, 112 Ga. 365), and there being evidence from which the jury could find that the presumption of negligence against the railroad company was not overcome, the refusal to sanction the petition for certiorari, complaining that the verdict was contrary to the law and the evidence, was not erroneous.

(Syllabus by the Court.)

Error from Superior Court, Clay County; H. C. Sheffield, Judge.

Action by W. A. Woolsey against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. Rambo and W. D. Kiddoo, for plaintiff in error.
King & Castellow, for defendant in error.

PER CURIAM. Judgment affirmed.

WRIGHT v. MINNEAPOLIS, ST. P. & S. S. M. Ry. Co.

(Supreme Court of North Dakota, June 27, 1903.)

[96 N. W. Rep. 324.]

Stock, Injuries to—Presumption of Negligence.*

Where plaintiff, in an action for the negligent killing of cattle by a railroad train, made proof of his ownership of the cattle, their value, and the fact of their having being killed by a train, a prima facie presumption of negligence was established without further proof. The statute, section 2978, Rev. Codes 1899, creates a presumption of negligence from the fact of killing by the cars.

Same—Contributory Negligence—Stock Unlawfully at Large.

Where plaintiff, at a time when it was unlawful for stock to be at large, turned his horses out, with knowledge of their habit of going upon the railroad right of way, yet took no means of herding them or keeping them off from the railroad track which ran through and across his land and in close proximity to and in plain view from his house, and where no duty was imposed upon the railroad company to fence its right of way, he was guilty of such contributory negligence as will defeat an action for the killing of a horse by one of defendant's trains.

(Syllabus by the Court.)

Appeal from District Court, Barnes County; Glaspell, Judge.

Action by F. P. Wright against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company for the killing of plaintiff's stock. Verdict and judgment for plaintiff. From an order denying its motion for a new trial, defendant appeals. Reversed.

Lee Combs, for appellant.

Lockerby & White and E. H. Wright, for respondent.

COCHRANE, J. Plaintiff's farm is crossed by defendant's railway in a northwesterly direction. A public road or

*See preceding case and foot-note.

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highway runs north and south through plaintiff's farm, crossing the railroad track 30 rods northwest of plaintiff's house. From this road, crossing eastward, defendant's track is fenced on both sides to a point beyond the east boundary of plaintiff's land, but at the east end these fences are not connected by an end fence. At the highway crossing there was a cattle guard between the rails, and the space between the cattle guard on either side of the track and the fence was closed. This cattle guard was not sufficient to turn cattle or stock, but plaintiff's stock frequently walked over it. It was conceded that there was no duty on defendant to fence its right of way. On March 2, 1901, two cows, valued at \$30 each, belonging to plaintiff, were killed by defendant's trains. On April 14, 1901, a horse of plaintiff's valued at \$150, was found near the railroad track with his legs broken, so that he had to be shot. After a verdict for plaintiff for the full value of the property claimed, defendant moved for a new trial because of the insufficiency of the evidence to justify the verdict. The trial court denied the motion of defendant upon condition of plaintiff's remitting \$30 of his verdict, the value of one of the cows. The remittitur was made, and defendant appealed from the judgment entered on the verdict.

In making out his case as to the killing of the cows, plaintiff made proof of his ownership and the value of the cows, that they were killed by defendant's trains, but offered no evidence tending to show any negligence by defendant or its employees. He relied upon the statutory presumption of negligence raised by the fact of such killing, as he had a right to do in the first instance. Section 2978, Rev. Codes 1899; *Hodgins v. Railway Company*, 3 N. D. 382, 56 N. W. 139; *Bishop v. Railway Company*, 4 N. D. 536, 62 N. W. 605.

Defendant, to overcome the prima facie case so made by its adversary, introduced as witnesses the engineer and fireman of the passenger train No. 108, which passed the place where these cattle were killed, going east, on the morning of March 2, 1901. The testimony of these witnesses disclosed the killing of one only of the cows by this train, but under circumstances which, in the judgment of the trial court, fully overcame the statutory presumption of negligence, and entitled the defendant to a discharge as to this part of plaintiff's demand. *Hodgins v. Railway Company*, 3 N. D. 382, 56 N. W. 139. The remittitur of \$30, ordered by the trial court on the motion for a new trial, was for the value of this cow. As to the second cow included in the verdict, the evidence was such as to indicate that it was killed by a train going west, and therefore could not have been killed by passenger train No. 108, which killed the first one. This second cow was found dead near the track, about two rods west of the highway crossing. From a point about 25 rods east of this crossing there were footmarks for seven or eight rods, where "the cow had made great leaps along the track"; also evidence in-

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dicating that she had been dragged west along the track 15 rods, leaving marks of blood, hair, horns, and hide on the track, to the point near which the broken and bruised body was found. This evidence is not reconcilable with the theory that the cow was killed by a train moving in an easterly direction. The jury must have found, as they had a right to do if they believed this evidence, that this cow was killed by some other train, and not by passenger train No. 108. Defendant offered no evidence to meet this condition of the proof. The statutory presumption of negligence from the killing of this cow by defendant's train was not overcome, and is sufficient to sustain the verdict for her value.

As a second cause of action, plaintiff sought to raise against the defendant the statutory presumption of negligence by proof of circumstances tending to show that the horse, the subject of his second cause of action, was injured through coming in contact with the cars. No direct proof of this fact was made. The circumstances proven were consistent with, and render probable, the conclusion that the horse was injured through being struck by one of defendant's trains, as alleged in the complaint, but such circumstances do not exclude the possibility that the horse became frightened at the train or some other object, and received its injuries by running over the cattle guard, or in some other way. Assuming, for the purposes of this opinion, that a prima facie case of negligence was made out by these proofs, as against this plaintiff's evidence discloses a clear case of contributory negligence, which must defeat his recovery as a matter of law. Between April 1st and November 1st it was unlawful for stock to be at large. *Ely v. Rosholt*, 11 N. D. —, 93 N. W. 864. Plaintiff's horse was a trespasser upon defendant's right of way, and as to it the measure of defendant's duty was to exercise ordinary care not to injure it after it was discovered to be in a place of danger. Defendant's employees, in operating its train, were not required to keep a lookout for trespassing stock. *Bostwick v. Railway Company*, 2 N. D. 450, 51 N. W. 781; *Hodgins v. Railway Company*, 3 N. D. 389, 56 N. W. 139; *O'Leary v. Elevator Company*, 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677. Plaintiff's land was on both sides of the railroad track, the land north of the right of way was open prairie, his house in plain view of and within 30 rods of the track. The fence and cattle guards at the west end of the railroad fence at the highway crossing were insufficient to turn stock. Plaintiff's horses and cattle walked over this cattle guard without let or hindrance. At the east end of the fence there was nothing to prevent the stock going onto the right of way. Plaintiff's stock were in the habit of going onto the right of way over the cattle guard, and had done so all winter. He had seen them do so a good many times up to the day of the killing. Plaintiff knew that his horses, when they went onto the right of way and along the railroad track,

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were in danger, and he usually drove them out when he saw them there. Three weeks before this horse was injured he had the two cows hereinbefore mentioned killed on this right of way, yet he turned his horses loose on this 14th day of April, without watch or attendant, to follow what he speaks of as the "habit" of going onto the right of way. On April 14th both plaintiff and his hired man saw his horses on the track at 1 p. m., yet neither made any endeavor, so far as the evidence shows, to drive them out of their plain exposure to danger. Plaintiff was guilty of the grossest kind of negligence in permitting his horses to run at large under these circumstances. He turned them out, in defiance of the law prohibiting their being at large, into a place of known danger, with knowledge of their habit of going onto the track, there to become a menace to the safety of the traveling public as well as to the property rights of the common carrier. The law and the Golden Rule required that parties find a safer method than this of marketing their stock. *Peterson v. Railway Company (Wis.)* 56 N. W. 639; *Carey v. Railway Company (Wis.)* 20 N. W. 648; *Richardson v. Railway Company (Wis.)* 14 N. W. 176; *McMullen v. Dickerson Company (Minn.)* 65 N. W. 663; *La Flamme v. Railway Company (Mich.)* 67 N. W. 556; *Robinson v. Railway Company (Mich.)* 44 N. W. 779, 19 Am. St. Rep. 174; *Niemann v. Railway Company (Mich.)* 44 N. W. 1049; *Hanna v. Railway Company (Ind.)* 21 N. E. 903; *Railway Company v. Skinner*, 19 Pa. 303, 57 Am. Dec. 654; *St. Louis, etc., Co. v. Monday (Ark.)* 4 S. W. 784; *Chicago, etc., Ry. Co. v. Goss*, 17 Wis. 433, 84 Am. Dec. 755. Defendant's request for a directed verdict as to the second cause of action should have been granted.

The judgment of the district court is reversed. That court is directed to set aside its judgment and to order judgment for the plaintiff for \$30, conditioned upon his filing a remittitur for \$150 of the amount of his verdict, this representing the value of the horse; otherwise to order a new trial. Appellant will recover costs of this appeal. All concur.

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(Supreme Court of Georgia, Aug. 13, 1903.)

[45 S. E. Rep. 366.]

Dog Killed on Track—Liability of Railroad.*

This case is controlled by the decision of this court in the case of

*As to the liability of a railroad company for killing dogs, see generally, note appended to *Richardson v. Florida Cent. & P. R. Co. (S. Car.)*, 15 Am. & Eng. R. Cas., N. S., 575.

Liability under laws of Florida, see *Florida Cent. & P. R. Co. v. Davis (Fla.)*, 7 R. R. R. 447, 30 Am. & Eng. R. Cas., N. S., 447.

Liability under laws of Arkansas, see *St. Louis S. W. Ry. Co. v. Stanfield (Ark.)*, 8 Am. & Eng. R. Cas., N. S., 115.

Liability under laws of Mississippi, see *Mobile & O. R. Co. v. Holiday (Miss.)*, 23 Am. & Eng. R. Cas., N. S., 955.

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Jemison v. Southwestern Railroad, 75 Ga. 444, 58 Am. Rep. 476, holding that a suit cannot be maintained against a railroad company for the negligent killing of a dog.

Same—Same.

As the rule announced in the above-stated case has stood as good law since December 1, 1885, and the General Assembly has passed no act changing the same, this court is of opinion that the rule should not be now changed by overruling that case.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by C. S. Strong against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. Gordon, for plaintiff in error.

Rosser & Brandon, for defendant in error.

PER CURIAM. Affirmed.

COBB, J. (concurring). I concur in the judgment and in the rulings made to the effect that the present case is controlled by the case cited in the headnote, and that this case should not now be overruled. The silence of the General Assembly for 18 years is indicative of the legislative policy on the subject of the status of the dog in this state, so far as the liability of railroad companies is concerned. The question as to how far the dog shall be treated as property has been the subject of numerous decisions in the different courts of this country. See the very elaborate monograph note, in *Graham v. Smith*, 40 L. R. A. 503, to the case of *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323. See, also, the note in *St. Louis S. W. Ry. Co. v. Stanfield*, 37 L. R. A. 659, to the case of *St. Louis Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659. The trend of modern decisions seems to be in favor of treating the dog as property to the same extent that other domestic animals are treated. Speaking alone for myself, I see no good reason why the dog should not have the same status before the law as the hog, the barnyard fowl, or any other domestic animal usually found about homes and farms. The present able and learned judge of the Atlanta circuit had before him recently the question as to whether a dog could be seized on execution. While the case did not reach this court, our attention has been called to an interesting opinion filed in the case, which bears evidence, not only of the usual learning and research of that judge, but also of the fact that he is not unable to deal with the subject of the dog in a sentimental way. I take the liberty of attaching hereto extracts from this opinion:

"The dog has figured very extensively in the past and present. In mythology, as Cerberus, he was intrusted with watching the gates of hell, and he seems to have performed his duties so well that there were but few escapes. In the history

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of the past, he has been used extensively for hunting purposes, as the guardian of persons and property, and as a pet and companion. He is the much valued possession of hunters the world over, and in England especially is the pack o' hounds highly prized. In literature he has appeared more often than any other animal, except perhaps the horse. Sometimes he is greatly praised, and at others greatly abused. Sometimes he is made the type of what is mean, low, and contemptible; while at others he is described in terms of eulogy. Few men will forget the song of their childhood, which runs:

“ ‘ Old dog Tray ’s ever faithful ;
Grief cannot drive him away ;
He is gentle, he is kind ;
I'll never, never find
A better friend than old dog Tray.’

“Nor can any of us fail to remember the intelligent animal on whose behalf ‘Old Mother Hubbard went to the cupboard.’

“Few men have deserved, and few have won, higher praise in an epitaph than the following, which was written by Lord Byron in regard to his dead Newfoundland: ‘Near this spot are deposited the remains of one who possessed beauty without vanity, strength without insolence, courage without ferocity, and all the virtues of man without his vices. This praise, which would be unmeaning flattery if inscribed over human ashes, is but a just tribute to the memory of Boatswain, a dog who was born at Newfoundland May 3, 1803, and died at Newstead Abbey November 18, 1808.’ The dog has even invaded the domain of art. All who have seen Sir Edwin Landseer’s great pictures will know how much human intelligence can be expressed in the face of a dog. His picture entitled ‘Laying Down the Law’ will not be forgotten in considering the dog as a litigant. Thus the dog has figured in mythology, history, poetry, fiction, and art from the earliest times down to the present, and now in these closing days of the nineteenth century we are called upon to decide whether a dog is a wild animal (*feræ naturæ*) in such sense as not to be leviable property; or, if he is a domestic animal (*domitæ naturæ*), whether he is not subject to levy, on the ancient theory that he had no intrinsic value if he was not good to eat. Originally, all the animals which are now used by man were wild. One after another they have become domesticated, and subject to his control, ownership, and use. As time progressed, they gradually lost their character of wildness, and became more and more subject to mankind, and more and more regarded as ordinary property. At this day no one would contend that the horse was not the subject of absolute property because his ancestors were originally wild, and the same may be said of other animals now thoroughly recognized as domestic. Even in the days of Blackstone, while it was declared that the property in a dog was ‘base property,’ it was nevertheless asserted that such property

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was sufficient to maintain a civil action for its loss. 4 Bl. Com. 236. Since that day, in the evolution of civilization, the dog has not been left behind. He is now not only prized for hunting purposes, as a watch dog, and as a pet, but it is common knowledge that many dogs have an actual commercial and market value. When annually there is held in New York a bench show, at which dogs take prizes amounting to thousands of dollars, and where they are bought and sold at prices which are frequently far larger than are paid for ordinary horses, it is rather late in the day to assert they are not valuable property. Dogs are also trained for purposes of exhibition, being sometimes the sole means of support of their masters. It would be an interesting survival of archaic law to say that a showman could put up his tent, give nightly exhibitions of his valuable dogs, making large sums of money from them, get in debt to any given extent, laugh at his creditors, and proceed with his daily exhibitions, on the ground that his stock in trade is not subject to levy. If it be contended that the horse, mule, and other animals are used for more practical purposes, some of them as beasts of burden, it need only be asked what animals draw the sleds of the Eskimos and others in the Northern latitudes? Nor is this confined alone to the Arctic Regions. Any traveler on the continent of Europe, and especially through Belgium, who has kept his eyes open, has seen these animals drawing heavy loads, and often taking the place of other draft animals. To indulge in technical refinement, and declare that the dog is not subject to levy, although he belongs to a debtor, is useful to him, can be and is actually used, may be transferred by him to another, and is as much the subject of bargain and sale as any other property, merely because in the remote past the ownership of his progenitors may have been considered qualified or 'base,' seems to me untenable on its face. The ancient idea that 'animals which do not serve for food, and which therefore the law holds to have no intrinsic value,' were not the subject of larceny (4 Bl. Com. 236,) has passed away. Now the stomach is not the only criterion of value. Even then, as already stated, a civil action could be brought for the loss of a dog. Generally, property which may be sold and possession delivered is a subject of levy, omitting choses in action and equitable assets. 7 Am. & Eng. Enc. L. 127.

"The dog has been very often before the courts of the different states and of different countries, and has been the subject of a good deal of judicial humor and judicial learning; but it bears a tinge of the ridiculous to contend that, however many and however valuable dogs a man may own, he cannot be made to pay his debts if he will only invest his money in dogs—a contention which reminds one of the very solemn discussions in a certain court, at a time not very long past, as to whether the oyster was a wild animal. Before the

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courts, the dog has received a treatment as varied as that given him by authors. As illustrative of the widely different light in which judges have viewed him, I cite only one or two cases. Monroe, J., in *Wilson v. Railroad Co.*, 10 Rich. (S. C.) 52, indulged in some vituperative epithets upon a poor canine who was so unfortunate as to be run over by a railroad train. On the other hand, in the case of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, in which a majority of the court held that dogs did not fall within the criminal statute of that state against the killing or wounding of 'domestic animals,' Appleton, C. J., dissented most vigorously, making use of the following language, as quoted by the Supreme Court of Georgia in *Patton v. State*, 93 Ga. 112, 19 S. E. 734, 24 L. R. A. 732: 'He is a domestic animal. From the time of the pyramids to the present day; from the frozen pole to the torrid zone—wherever man has been—there has been his dog. Cuvier has asserted that the dog was, perhaps, necessary for the establishment of civilized society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master, accompanying him in his walks; his servant, aiding him in his hunting; the playmate of his children; an inmate of his house, protecting it against all assailants.'

"I need not stop to discuss the learned dog law evolved by judges of other states and countries. Turning to our own state, I will only glance hastily at the status of our law with reference to the dog. At the outset, I may remark that the argument used with reference to dogs applies much more strongly to some other animals and to birds. It will be readily perceived that lions, tigers, and other wild animals which are captured, and reduced from their native state to the subjection of the menagerie, are much less domestic animals, or animals in which there is absolute property, than dogs. So, likewise, birds which are entrapped and kept in cages are much nearer their wild state than the dog; and yet it will hardly be contended that all the traveling menageries of the country are free from levy, or that a man may set up an aviary, and make an excellent living by selling birds, while his sorrowing creditors hang about his door with a bailiff and a fi. fa., but can come no nearer to the desideratum of a levy than to 'listen to the mocking bird.' If it be urged that there is no express enactment declaring the dog to be property, and the subject of levy, I would suggest that I am unable to find express enactments making a great many other animals, which were originally wild, the subject of levy; nor am I aware of any statute abolishing the right of common, of pasture, or of estovers, or other similar rights, and yet our Supreme Court has not hesitated to hold that they are not applicable to present conditions. In the case of *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764, the Supreme Court

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of Georgia held that a canary bird which had been caught and tamed was property, for which a possessory warrant would lie. In the case of *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, it was held that a dog was not such property that, if it were killed by a railroad train, a presumption would arise against the company, or that there could be a recovery for its mere negligent killing. The case in *Wilson v. Railroad Co.*, 10 Rich. Law, 52, above referred to, is cited as authority; but an examination of the opinion in that case will show that the justice rendering it used language referring not only to dogs, but to domestic fowls and animals other than cattle. It is true that in the course of the opinion in the *Jemison Case*, the learned justice who delivered it made use of the following language: 'Dogs are not property in such sense as makes them assets belonging to the estate of a deceased person, and are never inventoried and appraised, however numerous or valuable, nor are they subject to levy and sale, so far as we are informed.' But this was merely said *arguendo*. No question of levy and sale was before the court, and while the justice was one distinguished for his learning, such a casual remark cannot be held to have been the deliberate decision of the court. The Constitution of the state (Civ. Code, § 5883) authorizes the General Assembly to impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property. By the use of the expression 'other property,' it is evident that these animals were treated as property by the fundamental law of the state. Further, dogs are by the statute law of the state the subject of larceny. Pen. Code, § 164. Civ. Code, § 3822, provides for liability on the part of the owner of a dog for damage done by it under certain circumstances. In the case of *Patton v. State*, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732, it was held that a penal statute then under consideration did not apply to the injuring or killing of animals of any kind, and therefore, of course, did not apply to the dog. The opinion in that case is both interesting and instructive, but it did not undertake to decide that a dog was not property; and this was distinctly so declared in the case of *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323. On page 436, 100 Ga., and page 226, 28 S. E., referring to the case of *Patton v. State*, it is said: 'In the latter case, however, the ruling was based on the construction that the subjects of that particular statute were inanimate property. In the case last cited it was held that 'the owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion.' In the well-considered opinion it is expressly declared that a dog is property. It seems to me that the principles there enunciated control this case. Let it be remembered that in a trover case the plaintiff has the option of taking a verdict for the property or a money verdict. If

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he should take a money verdict, surely the law did not contemplate that he should sit in court with his judgment and fi. fa. in his pocket, and watch the defendant carry the dog away, because, although he could recover a judgment for its value, he could not realize it by levy. In the case of *Wilcox v. State*, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709, it was distinctly held that the words 'domestic animals' included dogs."

See, also, in this connection, *Hamby v. Samson* (Iowa) 74 N. W. 918, 40 L. R. A. 508, 67 Am. St. Rep. 285 et seq.; *Hayward v. State*, 41 Ark. 479; *Mullaly v. People*, 86 N. Y. 365; *Ingram on Law of Animals*, 591; *Wilson v. Railroad*, 10 Rich. Law, 52; *Citizens' Rapid Transit Co. v. Dew* (Tenn.) 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754.

FISH, P. J. I concur in the judgment and rulings of the court, for the reasons stated in the concurring opinion of JUSTICE COBB.

ZOOK v. PENNSYLVANIA R. CO. et al.

(*Supreme Court of Pennsylvania, July 9, 1903.*)

[56 Atl. Rep. 82.]

Railroads—Use of Streets—Construction of Siding—Municipal Powers.

Where bill is brought to prevent a railroad company from laying a siding in a street in any other manner than in accordance with the established grade, the question of the power of the city to grant permission to construct such siding cannot be considered.

Same—Same—Same—Injunction.

Plaintiff sued to restrain a railroad company from laying a siding other than on the established grade of a street. The evidence showed that the tracks, if laid in the manner contemplated, would be some nine inches above the established grade, and would seriously interfere with plaintiff's access to her property; that surface water would be thrown by the embankment on plaintiff's land; and that the work was being done without the authority of the city council, in violation of the ordinance authorizing same: *held*, that an injunction should be granted.

Appeal from Court of Common Pleas, Lancaster County.

Action by Emma Zook against the Pennsylvania Railroad Company and others. From a decree for plaintiff, defendants appeal. Affirmed.

The court below found the facts to be as follows:

"While the facts of this case, as brought out upon the final hearing, differ in only a few respects from those which were ascertained by us upon the hearing of the motion to dissolve the preliminary injunction, yet, as this is the final hearing, we are bound, under the equity rules, to again specifically find them, so that the case may be intelligently presented for review.

"It is not denied that Mrs. Zook, the plaintiff, is a resident of the city of Lancaster, and that she owns a tract of land,

with warehouses and storehouses erected thereon, located on the north side of a public street in the said city, known as 'Harrisburg Avenue,' near its junction with North Mulberry street. These buildings are used for the packing and storing of tobacco. The tracks of the Quarryville Branch of the Columbia & Reading Railway have been laid upon North Mulberry street, between James street and Harrisburg avenue, and thence, crossing northward over Harrisburg avenue, run a short distance to the west of the buildings of the plaintiff, to meet the tracks of the main line of the Columbia & Reading Railway, which lie farther to the north. Formerly these tracks were laid in accordance with the provisions of the charter of the Lancaster & Narrow Gauge Railroad Company, at grade; but several years ago the Pennsylvania Railroad Company raised its bridge at the place where its main line crosses under North Mulberry street, and because of this change it at the same time raised the tracks of the Quarryville road for a distance of at least 75 feet on each side. Subsequently the tracks of the Quarryville road were also raised at Harrisburg avenue, and they are now at that place from 9 to 10 inches above the grade of the street. There was no authority given by the city of Lancaster for the making of any such changes as these, and, as we shall hereafter ascertain, it is extremely doubtful whether such authority could have been given. But no action, however, has been taken on the part of the city to re-establish the former condition.

"The main tracks of the Pennsylvania Railroad Company, which is a corporation incorporated under the laws of the state of Pennsylvania, and doing business and owning and operating railroad tracks and sidings, lie to the westward. G. Sener & Sons, the defendants, who are a firm composed of William Z. Sener, J. Fred. Sener, and others, are engaged in the coal and lumber business in this city. They have purchased a tract of land immediately to the east of the plaintiff's property, and they now propose to run a siding from the tracks of the Pennsylvania Railroad Company along Harrisburg avenue to their own property. It will thus be observed that the plaintiff's property lies between the main line of the Pennsylvania Railroad Company and the property of G. Sener & Sons. Some years ago the Pennsylvania Railroad Company ran a siding from its main tracks eastward along Harrisburg avenue over ground where a pavement has since been laid, along the south side of that street, to a frame building, which is now said to be used by its employees as a carpenter shop. This siding extends up to a point from about 100 to 130 feet of the Quarryville Railroad tracks. Some time after it was put down by the Pennsylvania Railroad Company, that company pushed it out into the street on Harrisburg avenue, filled in with dirt the place where it formerly was, and then laid a pavement at that place. It is now proposed by G. Sener & Sons to extend that siding further along Harrisburg avenue,

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longitudinally, eastward, and to cross diagonally from the south side of that street to the north side, and across the tracks of the Quarryville Branch of the Columbia & Reading Railway, in front of the plaintiff's property, thence continuing along Harrisburg avenue, and crossing the gutter on the north side of that street about 50 feet east of the Zook property, and in upon their own premises. The effect of this will be that the tracks of the siding will run about 12 feet from the curb line of the street before the Zook property, and they will be raised to the same height as those of the Quarryville Branch of the Columbia & Reading Railway, which, as we have before said, are now between 9 and 10 inches above grade. To be strictly accurate, they are, according to actual measurement, 9 $\frac{1}{8}$ inches above grade, and the fall from the tracks to the bottom of the gutter will be 13 $\frac{1}{4}$ inches. Prior to the commencement of the work now complained of, an ordinance was adopted by the city councils of the city of Lancaster, and approved by the mayor, whereby the said G. Sener & Sons were given the right and privilege to lay a siding railroad track on Harrisburg avenue to connect with the main line of the Pennsylvania Railroad Company at a point on the south side of the said Harrisburg avenue, and to extend eastward on the siding now on the south side of Harrisburg avenue, and across said Harrisburg avenue at Mulberry street, into their property fronting on said Harrisburg avenue, and arrived at said point in said public road, near Maysville Park Prince street; provided that the said work should be done under the supervision of the street committee. There was, however, nothing contained in the ordinance whereby the defendants were permitted to lay the track above the grade of the street. In pursuance of authority claimed by them under the said ordinance, the said G. Sener & Sons made an arrangement with the Pennsylvania Railroad Company by which it should do the work of laying the siding for them. Near daybreak on the morning of June 3, 1902, about 75 men, employees of the Pennsylvania Railroad Company, under the direction of Mr. Wiseman, the supervisor of said company, began to lay the said siding above the grade of the street, and had it completed to a considerable extent, the frog being placed at its junction with the Quarryville Branch, and the ties being laid, but the dirt and ballast not being yet filled in, when they were stopped by the injunction granted in pursuance of this bill. There is no doubt that the tracks, as thus laid, will be above the grade of the street, and it has been shown by a preponderance of proof—and we therefore find it as a fact—that the effect of this will be to render it difficult, if not impossible, for the plaintiff to have access to her property from Harrisburg avenue, if this change is made, especially so with large teams; and that the entrance and exit to and from the building and the use of it will be incumbered and hindered. In addition it has also been shown that since

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the shedding has been erected upon the Sener property a larger amount of water collects on Harrisburg avenue, and that this water drains upon her property in larger quantities than it formerly did before any such change was made, and that, if the track is completed as proposed, the Zook property will be, to a more or less extent, damaged by reason of water draining thereon in larger quantities than before. The water naturally drains to the northwest, and the change will cause an undue diversion of it. It is said by Mr. J. Fred. Sener that it was not the intention of the defendants to lay the tracks on the grade of Harrisburg avenue as that street is at the present time, and it was also admitted by him that the street will have to be filled up in order to make access possible to the Zook property. But there has been no change in the grade, and no authority shown under which any such filling in can be legally done in the said street. It is because of these grievances, and in order to protect herself against them, that the plaintiff has filed the present bill."

The following decree was thereupon entered:

"That the defendants, G. Sener & Sons, William Z. Sener, and J. Fred. Sener, and the Pennsylvania Railroad Company, their officers, agents, operators, and workmen, are hereby enjoined and restrained perpetually, by the order and injunction of this court, from laying a railroad track or siding on Harrisburg avenue, in the city of Lancaster, to connect with a siding of the Pennsylvania Railroad Company at a point from 100 to 130 feet west of the tracks of the Quarryville Branch of the Columbia & Reading Railroad Company, and extending eastward, on the south side of Harrisburg avenue, and crossing diagonally said avenue at Mulberry street over the tracks of the said Quarryville Branch of the Columbia & Reading Railway Company, and further along Harrisburg avenue, and into the property of the said G. Sener & Sons, which fronts upon said street; and also from laying said siding above the established grade of said Harrisburg avenue, and from placing or erecting any ballast, ties, or other obstructions over and upon said avenue above the established grade thereof; and they are further enjoined and restrained perpetually from interfering or intermeddling with the established grade of the said street or avenue before the plaintiff's premises by laying any railroad track or siding thereon."

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

A. B. Hassler and H. M. North, for appellants.

W. U. Hensel, for appellee.

BROWN, J. The real defendants below were G. Sener & Sons. The complaint of the appellee, as set forth in her bill, is that under an ordinance passed by the councils of the city of Lancaster, authorizing them to lay a siding railroad track on Harrisburg avenue, in the city of Lancaster, to connect with the main line of the Pennsylvania Railroad, they were

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about, without any authority so given by said ordinance, to change the grade of said Harrisburg avenue as established by law, and to lay the said track or siding in front of her property at an elevation above the grade of the avenue and above the surrounding grade and level of the street or avenue, in such manner as to interfere with her property, to obstruct ingress and egress thereto and therefrom, to prejudice, damage, and despoil the same, to imperil the same by great damage from water, and in many and various ways to interfere with and incumber her in the use of her property and in the use of said street or avenue, and her prayer for relief is "that the said G. Sener & Sons, William Z. Sener, and J. Fred. Sener, and the Pennsylvania Railroad Company, their officers, agents, operatives, and workmen, be enjoined and restrained, now temporarily and hereafter perpetually, by the order and injunction of this court, from laying said railroad track or siding above the established grade of said street or avenue, and from placing or erecting any ballasting, ties, railroad track, or other obstruction along, over, and upon the said street or avenue, and from digging any ditches, making any embankments, or in any way incumbering the said Harrisburg avenue, and from interfering or intermeddling with the established grade of said street or avenue in any other manner than to lay their said track upon the established grade thereof." In awarding the injunction restraining the defendants from laying the siding, the learned judge below relied chiefly on the want of power in the city councils to grant permission to construct it. This question is not raised by the pleadings, and cannot enter into the decision of the case. The only issues to be passed upon in a suit in equity are those raised by the pleadings. *Thompson's Appeal*, 126 Pa. 367, 17 Atl. 643; *Pennsylvania Schuylkill Valley Railroad Co. v. Philadelphia & Reading Railroad Co.*, 160 Pa. 277, 28 Atl. 784; *Morio's Appeal*, 4 Penny. 398. What the plaintiff below complained of was, not that the defendants were about to lay the siding, but that they were about to lay it at an elevation above the grade of the avenue, in such a manner as to interfere with her property rights; and the prayer is not for an injunction to restrain them from laying it, but from laying it "in any other manner" than "upon the established grade" of the street. We are to consider only that of which she complains, and determine whether or not, in the light of it, she is entitled to the specific relief asked for.

One of the conclusions of the court below was that "the ordinance granting permission to G. Sener & Sons to erect their siding, even if an exercise of powers legally vested in council, must necessarily be authority for a construction only on the grade of the street." The correctness of this proposition cannot be questioned, and to it the appellants seem to take no exception; but, to avoid the effect of it, they say that they proposed to lay the siding on the street as they found it. The answer to this, however, is, that the court has properly

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found as a fact from the testimony that "it will also be necessary to fill up the street to the level of the siding, and it will cause to be maintained at or about the center of the street an embankment, device, and construction of nine and five-eighths inches above its grade." On the material allegations of the bill as to the unlawful construction of the siding by the defendants and the injury resulting from such construction of it to the plaintiff, the findings of the court, which we will not disturb, were: "There is no doubt that the tracks, as thus laid, will be above the grade of the street, and it has been shown by a preponderance of proof—and we therefore find it as a fact—that the effect of this will be to render it difficult, if not impossible, for the plaintiff to have access to her property from Harrisburg avenue if this change is made, especially so with large teams, and that the entrance and exit to and from the building and the use of it will be incumbered and hindered. In addition it has also been shown that since the shedding has been erected upon the Sener property a larger amount of water collects on Harrisburg avenue, and that this water drains upon her property in larger quantities than it formerly did before any such change was made, and that, if the track is completed as proposed, the Zook property will be, to a more or less extent, damaged by reason of water draining thereon in larger quantities than before;" and another finding was: "The ordinance under which the defendants proceeded to lay this track provides that a track or siding should be laid under the supervision of the street committee of councils. No evidence has, however, been presented before us to show that the work was being so done, or that even the street commissioner or any member of the street committee had any notice that it was about to be done, or was consulted about the manner in which it was being done, and no authority from the city to make the fill and change the grade has been presented by any one, nor had any provision been made to perform or pay for such work." These findings were fairly found from the testimony, and, in view of them, the specific relief prayed for by the plaintiff for protection from what would be a continuing injury to her property and interference with her full and free use of it, could not have been withheld by the court below.

So much of the decree as perpetually enjoins G. Sener & Sons, William Z. Sener, and J. Fred. Sener, and the Pennsylvania Railroad Company, their officers, agents, operators, and workmen, from laying a siding above the established grade of Harrisburg avenue in the city of Lancaster, and from placing or erecting any ballast, ties, or other obstructions over and upon the said avenue above the established grade thereof in front of plaintiff's property, and from interfering or intermeddling with the established grade of the said street at said point, is affirmed; the costs below, as well as on this appeal, to be paid by G. Sener & Sons, W. Z. Sener, and J. Fred. Sener.

BOYER & LUCAS v. ST. LOUIS, S. F. & T. RY. CO. *et al.*

(Supreme Court of Texas, Nov. 5, 1903.)

[76 S. W. Rep. 441.]

Railroads—Construction in Streets—Injury to Property—Measure of Damages.

The measure of damages to property by the construction of a railroad in the street in front of it is the diminution in the market value thereof.

Same—Same—Same—Same—Instruction.

An instruction that the jury, in estimating the damages to property occasioned by the construction of a railroad in front of it, "can" consider the purpose for which the property was used, was not erroneous for using the word "can" instead of "must."

Same—Same—Same—Damages—Loss of Customers—Rebuttal.

Where, in a suit to recover damages to property occasioned by the construction of a railroad in the street in front of it, plaintiff, on direct examination, testified to an interference with his mercantile business and a loss of customers as a result of the running of trains in the street, and on cross-examination testified to an increase in his business, proof of the fact of a general improvement in business in the city was not admissible in rebuttal.

Same—Same—Same—Value—Evidence.

Where, in a suit to recover damages to property occasioned by the construction of a railroad in the street in front of it, the court admitted in evidence the renditions made by plaintiff of the property for taxes, plaintiff had the right to show that the assessor placed the valuations on the property.

Error from Court of Civil Appeals, Fifth Supreme Judicial District.

Action by Boyer & Lucas against the St. Louis, San Francisco & Texas Railway Company and others. Judgment for defendants was affirmed by the Court of Civil Appeals (72 S. W. 1038), and plaintiffs bring error. Reversed.

J. A. Templeton and Webb & Jones, for plaintiffs in error.

C. H. Smith, A. L. Beaty, and V. E. McInnis, for defendants in error.

WILLIAMS, J. This action was brought by plaintiffs in error to recover of defendant in error damages for depreciation in value of real estate owned by plaintiffs in Sherman, resulting from the construction and operation of the railway of defendant along an adjacent street. On one of the lots in question was a storehouse used by plaintiffs in the mercantile business, and on the others were tenement houses which plaintiffs rented to tenants. Certain citizens of Sherman, who had agreed with defendant to indemnify it against such claims for damages, were brought in by it in order that, in case of a recovery by plaintiffs, it might have judgment over against such indemnitors. The case was tried by jury, and verdict and judgment were rendered in favor of defendant. Upon appeal the judgment was affirmed by the Court of Civil Appeals. All of the assignments of error in the application to this court for writ of error have had our care-

ful consideration, and we find that further notice of most of them than was given by the Court of Civil Appeals is unnecessary.

The charge of the trial court contained no error of which the plaintiffs have cause to complain. It seems to be one of their contentions that, if the property was rendered less useful for the particular uses to which they had put it, they would be entitled to recover damages as for a diminution in the value of such property, although its market value may have been increased. This we do not understand to be the law. In estimating this item of damage, the effect of the construction and operation of the road upon the market value of the property is the measure. *Railway Co. v. Fuller*, 63 Tex. 467; *Streyer v. Georgia S. F. R. R. Co.*, 90 Ga. 56, 15 S. E. 637. Of course, the particular purposes to which property is devoted, as well as others to which it is adapted, may be shown in evidence to enable the court and jury to determine its market value, and the effect of the construction and operation of the railroad upon it; but when only the damage done to the value of the property is under consideration, that must be measured by its market value. In *Alloway v. City of Nashville (Tenn.)* 13 S. W. 123, 8 L. R. A. 123, the true rule is thus quoted from *Lewis on Eminent Domain*: "The market value of property includes its value for any use to which it may be put. If, for reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases hold that its value for a particular use may be proved; but the proper inquiry is, what is its market value, in view of any use to which it may be applied, and of all the uses to which it is adapted? * * * The condition of the property, and all its surroundings, may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, what is it worth in the market?"

Owners of property abutting on streets occupied by railroads may suffer damages besides the diminution of the value of their property, as has been held by this court. *Daniel v. Ft. W. & R. G. Ry. Co. (Sup.)* 72 S. W. 578, 6 Tex. Ct. Rep. 791. The present question relates only to the ascertainment of damage to the value of the property itself. The rule to be applied is laid down in the *Fuller Case* and many others in this court, and was observed by the trial court in its charge. One objection urged

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to the charge is that it directs the jury that they "can," instead of "must," take into consideration the purpose for which the property was used. If it was proper for the court thus to call the attention of the jury to only one of several things which it might be the duty of the jury to weigh—which we need not now decide—the instruction given was correct so far as it went. If a more positive expression was desired, a special instruction should have been requested. The court required one of the plaintiffs, on cross-examination, to testify to an increase in his mercantile business after the construction and operation of the railroad, and refused to permit him to testify, in rebuttal, to the general increase in trade throughout the city of Sherman. As presented in the application for writ of error, an error was apparently committed in these rulings. The statement of facts, however, shows that the witness, as a reason for a diminution in the value of his property, had testified to an interference with his business and a loss of customers as a result of the running of trains along the street. In rebuttal to this, it was admissible for defendants to cross-examine him as to the increase of his business. Proof of the fact that there was a general improvement in business in Sherman would not have tended to support plaintiff's contention, which was that the value of his property had been lessened. There was no error in these rulings.

Complaint is made of the admission in evidence of renditions made by plaintiffs in the years 1900 and 1901 of the property for taxes, and of the refusal of the court to permit Boyer to testify in rebuttal thereof that not he, but the assessor, put the valuations on the property. The purpose of the evidence was to show that the values given by the plaintiffs in these renditions differed from those stated in their testimony. In other words, the renditions were evidently used as admissions made by plaintiffs. The papers had been identified as having been signed and sworn to by them as required by the statute. The oath was not to the valuations, but only to the correctness of the lists; but, as presented, the valuations appeared to be either the acts of the plaintiffs or those of the assessor, acquiesced in by plaintiffs. Batts' Ann. Civ. St. art. 5123; I. & G. N. R. R. Co. v. Smith Co., 54 Tex. 1. They were therefore admissible; but for the very reason that, without explanation, they might be treated as admissions, it was also admissible for the plaintiffs to show that the valuations were not in fact made by them, but by the assessor. If the question were as to the effect of the valuations for the mere purpose of assessment, it would probably be immaterial whether the owner or the assessor made it, the former not having contested it as provided by the statute. But the only effect the renditions can have in this case is as evidence of an admission, and their weight as such may

Southern Ry. Co. in Kentucky v. Thurman

depend upon proof of what the party to be affected by it said and did. While the renditions were properly admitted, the rejection of the proposed evidence to explain and limit their effect was, we think, improperly excluded, and, as the case was closely contested and depended upon a conflict of evidence, the error requires reversal.

Reversed and remanded.

SOUTHERN RY. CO. IN KENTUCKY v. THURMAN.

(*Court of Appeals of Kentucky, Oct. 28, 1903.*)

[76 S. W. Rep. 499.]

Bill of Exceptions—Stenographer's Notes—Passengers—Separate Coach Law.

Under Ky. St. 1903, p. 506, § 1019a, subd. 8, providing that the transcript made by the stenographic reporters and filed in the clerk's office, when certified by the court to be correct, may be used in the Court of Appeals as part of the record, a transcript of the stenographer's notes, which is certified as containing only all the oral evidence introduced, and which is not filed by order of court, cannot be treated as a bill of exceptions.

Assigning White Passenger to Wrong Car—Sufficiency of Complaint.

Under the separate coach law (Ky. St. 1899, §§ 797, 799), requiring railroad companies transporting passengers to furnish separate coaches for white and colored passengers, and directing the conductor to assign to each white or colored passenger his respective coach, a complaint to recover damages for requiring plaintiff to occupy a seat in the coach for negroes, which fails to allege that plaintiff was a white woman, or entitled to ride in the coach for white passengers, is insufficient to sustain a judgment for damages.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by Louella Thurman against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and Thornton & Kerr, for appellant.

W. C. Bell and Morton, Darnall & Wilson, for appellee.

BARKER, J. The appellee, Louella Thurman, obtained a judgment in the trial court against appellant, the Southern Railway Company, for the sum of \$4,000 damages for being, as she claims, ordered out of the ladies' coach into the negro coach of one of its trains, upon which she was a passenger. No bill of exceptions was signed by the trial judge, but in lieu thereof appellant has attached to the transcript a copy of the stenographer's notes, which is certified by that officer as containing a full and accurate transcript of the shorthand notes of the oral evidence heard in the case, and which was examined and approved by the trial judge. Prior to the submission of this case, appellee, by counsel, entered a motion to strike the stenographer's notes from the record. This

motion was not passed upon when made, but was submitted with the whole case. It is urgently insisted by counsel for appellant that the transcript of the stenographer's notes, certified and approved, as before stated, should be treated as the bill of exceptions, and much reliance is placed on section 8 of an act entitled "An act to provide for stenographic reporters for courts of continuous session" (Ky. St. 1903, p. 506, § 1019a, subd. 8) in support of this view. This act applies to circuit courts of continuous session in counties having a population of less than 150,000, and which constitute a separate judicial district, and therefore applies to the circuit court of Fayette county. Section 8 of this act is as follows: "The transcript or duplicate made by the reporter and filed in the clerk's office, when certified by the court to be correct, may be used in the Court of Appeals as part of the record in the action or prosecution in which the notes from which it has been transcribed were made." This language does not obviate the necessity of a bill of exceptions filed by order of court, but merely authorizes the use of the transcript filed in the clerk's office, in order to save the cost of copying it in the record. There is no substantial difference between this section of the special act and section 4644, Ky. St. 1899; and neither was intended to substitute the transcript of the stenographer's notes for the bill of exceptions. In the case of *McGeever v. Kennedy* (Ky.) 42 S. W. 114, it was said: "As to the bill of exceptions, the record shows that the official stenographer of the court below certifies that the transcript filed by him contains a full and accurate transcript of the shorthand notes of the oral testimony given on the trial of the case, and on page 67 he says that this was all the evidence offered by either party, or heard by the court and jury on the trial of the case. This transcript of the stenographer was examined and approved by the presiding judge of the court, who signed his name at the foot thereof, and this order was entered: 'The defendant, by counsel, tendered to the court a bill of exceptions and transcript of the testimony herein, and the court, having examined, approved, and signed same, orders that they be filed and made a part of the record and proceedings herein,' which was done." As to the sufficiency of this bill the court said: "The Code of Practice (section 335) provides that no particular form of exceptions or bill of exceptions is required, and the transcript filed with the record is a sufficient compliance with the statute to entitle appellant to avail himself of the exceptions which it shows were taken upon the trial of the case, and may be properly treated, under the facts of this particular case, as a bill of exceptions." In the case cited it was certified that the transcript contained all of the evidence heard upon the trial, and it was signed by the presiding judge, and filed as a bill of exceptions. Not so in the case at bar. The transcript of the stenographer's notes is not certified as contain-

ing all of the evidence heard upon the trial, but only all of the oral evidence introduced therein; nor was it filed by order of court; and, lacking these fundamental requirements, it cannot be treated as a bill of exceptions. It follows, therefore, that the motion of appellee to strike the stenographer's transcript from the record should be sustained, and the only question remaining to be considered is whether or not the pleadings support the judgment. *Martin v. Richardson* (Ky.) 21 S. W. 1039, and *C., O. & S. W. R. R. Co.'s Receivers v. Smith* (Ky.) 42 S. W. 538. The substance of appellee's complaint is that she was required, by the officer and servant of appellant, to leave the ladies' coach, and go forward into the coach set apart for negroes; that when she discovered that the coach into which she had been ordered to go was occupied by negroes she returned to the ladies' coach, and attempted to re-enter, but was prevented therefrom by the servant of appellant, who said to her that the reason he had ordered her into the negro coach was that "there was where she belonged; that he knew her of old, and that she belonged to a disreputable class, and resided in a disreputable locality in the city of Lexington"; all of which was insulting to appellee, and greatly mortifying and humiliating to her, to her damage, etc. The statute known as the "Separate Coach Law" (Ky. St. 1899, §§ 797 to 801, inclusive) requires railroad corporations operating within this state to provide separate coaches for the transportation of white and colored passengers, making their failure so to do a misdemeanor punishable by a fine of not less than \$500 nor more than \$1,500 for each offense. It also requires the conductors or managers of all railroads to enforce these provisions; the language of the statute upon this subject being as follows:

"Sec. 799. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"Sec. 800. That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of section 799 shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense."

It will thus be seen that it was the duty of appellant and its officers and employees to enforce the provisions of the separate coach law. This action was instituted by appellee to recover damages because appellant and its officers, in undertaking to enforce the law, had required her to leave the

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ladies' coach, and occupy a seat in the coach for negroes: but it is nowhere alleged in the petition that appellee was a white woman, or entitled to ride in the coach for white passengers. There is no allegation in the petition which shows that the officer, in requiring appellee to leave the one car and go into the other, was not strictly following his duty under the statute; nor is the matter alleged in aggravation of the main cause of action negatived. It is alleged that the brakeman said to appellee that the reason he had ordered her into the negro coach was because she belonged there; that he knew her of old; that she belonged to a disreputable class, and lived in a disreputable locality in Lexington; but there is no allegation that this was false in any part. Taken as a whole, there is nothing alleged against the appellant or its employees which is inconsistent with the discharge of their duty under the statute. It is a familiar rule that pleading must be construed most strongly against the pleader, and it would seem to follow, therefore, that the failure of appellee to allege that she was a white woman, and entitled to ride in the coach for white passengers, raises the presumption that she was not white, and not entitled to ride in the coach set apart for white passengers.

A general demurrer was filed by appellant to the petition, and overruled by the court. The answer does not cure the defects of the petition, and therefore the pleadings will not support the judgment.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

ROCK ISLAND & P. RY. CO. v. JOHNSON.

(Supreme Court of Illinois, Oct. 26, 1903.)

[68 N. E. Rep. 549.]

Streets—Dedication—Failure to Record Plats.

Where county commissioners, in laying out a town, failed to comply with statute providing for the recording of town plats, no statutory dedication of the fee of the streets designated on the plat was made, but only a common-law dedication thereof.

Same—Additional Servitude—Laying Second Track of Steam Railroad—Abutter's Right to Compensation.

The laying of a second track in the street by a steam railroad company under authority of a municipal ordinance is an additional servitude, for which an abutting owner, who owns the fee in the street, is entitled to compensation, though the owner's predecessor in title granted to the company's predecessor the right to construct and operate a track in the street pursuant to permission given to the company's predecessor by the municipality.

Same—Same—Same—Same—Injunction.

Where a steam railroad company lays a second track in a street, without making or providing for compensation to an abutting owner who owns the fee in the street, the remedy of such owner is by injunction to restrain the company from using the second track until

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it has acquired the right to do so by grant from the owner or by condemnation proceedings.

Laches.

A steam railway company constructed a track in a street. No work was done on it till 1898, and it was not until June, 1899, that it was used as a main track. The owner of the land abutting on the street applied for an injunction in April, 1899, as soon as he ascertained that the company intended to make and use the track as a permanent second track, and which he supposed was a temporary track only: *held*, that the abutting owner was not guilty of laches defeating his right to enjoin the company from using the second track.

Appeal from Circuit Court, Rock Island County; W. H. Gest, Judge.

Suit by Walter Johnson against the Rock Island & Peoria Railway Company. From a decree for complainant, defendant appeals. *Affirmed.*

Appellee filed his bill in the circuit court of Rock Island county on April 26, 1899, against the appellant, for an injunction to restrain it from using for railroad tracks, switches, yards, etc., the south half of Mississippi street (now called First avenue), in the city of Rock Island. The bill alleges that the complainant is the owner of lot 1, and the east 50 feet of lot 2, in block 6, in said city, which front north on said avenue; also that he owns the fee of the west half of Twelfth street, in so far as the same abuts upon his lot on the east; that he owns the fee to said south half of the avenue and half of Twelfth street, subject to an easement in said city over the same for a street; that said railroad company was in the act of laying down and constructing an additional or new main railroad track on said south half of said avenue, claiming the right to do so under and by authority of an ordinance of the city of Rock Island adopted July 6, 1898, without first obtaining the permission of complainant, or in any way compensating him therefor. An answer was filed by the defendant, denying all the material allegations of the bill, and upon replication thereto the cause was referred to the master to report his conclusions as to the law and the facts; but afterwards, by stipulation of the parties, he reported the testimony, without conclusions, and the cause was heard before the chancellor, and a decree rendered in favor of the complainant.

The bill is very voluminous, and seeks relief against various other acts alleged to have been done and committed by the railroad company; but the decree from which this appeal is prosecuted is based upon the last named allegation—that the complainant is the owner of the fee of the soil to the center of the street—and enjoins the defendant company from in any manner using or operating the new or main track so far as the same abuts and is north of the complainant's lots and the west 40 feet of Twelfth street, and from in any manner operating or using any train or trains of cars or locomotive over or upon said new track, or any portion thereof, in front of com-

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plainant's said lots on said avenue, or from permitting other persons or corporations to use the same, "until such time as defendant shall have obtained the right so to do by grant from complainant, or by the exercise of the right of eminent domain." To reverse that decree, this appeal is prosecuted by the railroad company.

The issues in the court below were substantially the same as in *Davenport & Rock Island Bridge Railway & Terminal Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497, and the facts are substantially the same. Most of the questions argued in that case have been reargued in this.

Robert Mather and Jackson & Hurst, for appellant.

J. T. Kenworthy, for appellee.

PER CURIAM. Counsel for appellant have presented an elaborate and able argument to convince this court that it ought to reconsider its decision in the other case that the county commissioners of Rock Island county, when they laid out the town of Stephenson (now part of the city of Rock Island), failed to make a sufficient plat to vest the fee of the streets in the municipality. We there held that they had failed to comply with the statute of 1833 providing for the recording of town plats, and therefore had not made a statutory dedication of the fee of the streets. Counsel claim that the county commissioners had no power to make any other kind of a plat, except a statutory plat; that they were commanded so to do by the Legislature, and could not make a common-law dedication. The Legislature has provided the requisites of a statutory dedication, and we have repeatedly held that these requirements must be complied with by every authority or person but the state itself. The county commissioners of Rock Island county not having complied with these requirements, no statutory dedication was in fact made, and the result is that there was a common-law dedication only.

It was also settled by this court in the other case that the center of the Mississippi river was the north line of the street now called First avenue, lying north of appellee's premises, and that he had title in fee to the center of such street, burdened by the public easement of a street. The appellant's predecessor, in pursuance of permission granted by an ordinance of the city of Rock Island, laid down a railroad track in the street now called First avenue in 1856, which track, known as the "old main track," has been maintained thereon continuously ever since in front of appellee's lots, and about which no complaint is made in the case at bar. There was also a switch or lead track connected with this main track, on the north side of it, at a point about 50 feet west of the east line of appellee's lot; said switch track running thence east. There were some switch tracks south of the old main track, but their location is not pertinent to this inquiry. On July 6, 1898, the city council of Rock Island

passed an ordinance granting appellant the right to construct and maintain an additional main track north of the old main track on First avenue, with necessary connections and switches, which track would run the whole length of the frontage of appellee's lots. Appellant extended its embankment further into the river, and laid an additional track north of the old main, coming from the west and running east in front of appellee's lot, but did not connect this new track with the tracks extending east. This new track was used as a track for hauling dirt by the contractors to make the fill, but afterwards the north switch track mentioned above was disconnected from the old main track, and moved and connected with the new track, to be used as a new main track. To prevent this use of the track as a permanent main track, appellee's injunction was granted, enjoining such use until compensation should be made to appellee.

Appellee derives title from Napoleon B. Buford, who was the owner of the lots in question and a director and officer of appellant's predecessor at the time the original main track was laid, in 1856. Appellant insists that the action of Buford in permitting such track to be laid upon the streets fronting his lots amounts to an executed license or implied grant of an easement for such width as was reasonably necessary for the transaction of the company's business, and that even a wrongful entry in 1856, and uninterrupted possession ever since, would give appellant an easement in the premises; that all rights of action accrued to Buford as the abutting owner, including the right to compensation for the putting down and use of the second main track; and that no right of action for compensation passed to appellee. As no complaint is made in regard to the original main track laid in 1856, the main question presented is, did the laying of such track, and the acquiescence of Buford therein, give the appellant's predecessor any other and further easement in the lots in question than that required for such track?

This was a steam railroad track laid on a public street of the city of Rock Island, the fee of which was in the abutter, and under these circumstances the rights acquired against the owner of the fee could be no greater than such as were granted by the ordinances of the city, and actually availed of by the railroad company. It could have no claim to a right of way of the extreme statutory width, for this railroad track was not laid across a farm or a portion of a city lot of which the owner had absolute control, but across land of which the control and easement were in the city for street purposes, and the company's rights were limited to the part of the street actually occupied, in pursuance of permission granted by the city to occupy such street. *Pittsburg, Ft. Wayne & Chicago Railroad Co. v. Reich*, 101 Ill. 157; *Wray v. Chicago, Burlington & Quincy Railroad Co.*, 86 Ill. 424; *Illinois Central Railroad Co. v. Indiana & Illinois Central Railway Co.*, 85

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Ill. 211. A great number of ordinances of the city of Rock Island were introduced in evidence, from which it appears that the appellant was repeatedly authorized by such ordinances to lay down additional tracks in other parts of First avenue and in other streets, but the original ordinance in 1856 merely granted the right to lay down one main railroad track in that street. Nor was there any other main track laid there until after the passage of the ordinance of 1898, which granted the privilege of laying down another main track north of, and 13 feet distant from, the former main track. The acceptance of the last ordinance clearly shows that appellant was aware that it had exhausted its rights acquired from the city under the first ordinance. But at all events, it could have no greater rights against the owner of the fee, without express agreement, than it acquired against the city under the ordinances of the city. That the laying of additional tracks in a street, the fee of which is in the abutter, is an additional servitude, for which such owner is entitled to compensation, is well settled. *Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545; *Davenport Bridge Railway Co. v. Johnson*, supra.

It is further urged on the part of appellant that appellee has lost his right to an injunction by laches, in permitting such additional track to be laid without objection. There is some conflict in the testimony as to just when the new main track was laid and completed, but we do not think that the appellee was guilty of any laches in the premises. No work was done on it till 1898, and it was not until June, 1899, that it was used as a main track. Appellee applied for an injunction in April, 1899, as soon as he ascertained that appellant intended to make and use the track, which he supposed was a temporary track laid for the purpose of filling in the embankment, as a permanent second main track. Injunction was the proper remedy. *Bond v. Pennsylvania Co.*, supra; *Davenport Bridge Railway Co. v. Johnson*, supra.

Some other points are discussed, but we regard them as unimportant or without application to the facts in the case. The decree will be affirmed. Decree affirmed.

MERSICK v. HARTFORD & W. H. HORSE R. CO.

(*Supreme Court of Errors of Connecticut, July 24, 1903.*)

[55 Atl. Rep. 664.]

Street Railways—Mortgages—Foreclosure—Preferential Claims—Supply Creditors.*

Persons furnishing to a street railway company supplies essential

*See generally, foot-note appended to *Niles Tool Works Co. v. Louisville, N. A. & C. Ry. Co.* (C. C. A.), 1 R. R. R. 936, 24 Am. & Eng. R. Cas., N. S., 936; note, 14 Am. & Eng. R. Cas., N. S., 819; *Savannah, F. & W. Ry. Co. v. Jacksonville, T. & K. W. Ry. Co.* (C. C. A.), 9.

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to operation of its road, and money to pay wages of employees and other pressing claims, after default in payment of interest on the bonds secured by mortgage on all its property, which default, under the mortgage, authorized the trustee to take possession of and operate the road, but before he did so, are not entitled to preference over the bondholders in the distribution of the proceeds of the sale of the mortgaged property; there having been no diversion of income for the benefit of the bondholders, but the income being inadequate to meet current expenses.

Same—Same—Same—Same—Expenses of Trustee.

Under a mortgage of a street railway company's property to secure its bonds, authorizing the trustee on default to take possession and operate the business of the company, and providing that he shall be entitled to be reimbursed for all outlays to be incurred in the trust, and that his disbursements shall constitute a first lien on the mortgaged property, a claim for money advanced by a third person at the request of the trustee, and paid for wages of employees while the trustee was in possession and to striking employees for wages earned during the three months before the trustee took possession (it being practically impossible to resume the operation of the road without first paying such striking employees the wages then due), and a claim for rent accruing after the trustee took possession of a road operated by him in connection with and for the benefit of the mortgaged property, under a contract to pay such rent, are entitled to priority as expenses properly incurred by the trustee.

Same—Same—Same—Same—Payment of Taxes.

One who at the request of a street railway company pays taxes on its mortgaged property does not have a lien on the property superior to the mortgage, though the company agrees he shall have.

Appeal from Superior Court, Hartford County; William S. Case, Judge.

Action by Charles S. Mersick, trustee, against the Hartford & West Hartford Horse Railroad Company, to foreclose a mortgage given to secure bonds of defendant, and for appointment of a receiver. Receiver appointed, and judgment of foreclosure by sale of mortgaged property rendered. Plaintiff and intervening parties appeal from the judgment giving priority to certain claims in the distribution of the proceeds of the sale. **Reversed.**

The defendant company was organized under the laws of this state, with power to equip and operate by electricity a street railroad between certain points in Hartford and West Hartford. On the 1st of August, 1894, said company mortgaged all its property and franchises to the plaintiff, State Treasurer, as trustee, to secure the payment of its bonds of the par value of \$315,000. On the 1st of August, 1897, the

Am. & Eng. R. Cas., N. S., 582; Southern R. Co. v. Carnegie Steel Co., Limited (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 420; Terre Haute & I. R. Co. v. Harrison (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 272; International Trust Co. v. T. B. Townsend Brick v. Contracting Co. (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 310; Southern Ry. Co. v. Adams (U. S.), 6 Am. & Eng. R. Cas., N. S., 790; Rhode Island Locomotive Works v. Continental Trust Co. (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 481; Gregg v. Mercantile Trust Co. (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 484; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (Ohio), 18 Am. & Eng. R. Cas., N. S., 397.

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railroad company made default of payment of interest on said bonds, and no interest has since been paid thereon. On the 4th of February, 1899, the plaintiff trustee, at the request of certain of the bondholders, and in accordance with the terms of the mortgage, assumed the possession and management of the road, and placed James T. Patterson, one of the bondholders, in control, as his (the plaintiff's) agent. On the 4th of March, 1899, the plaintiff trustee commenced an action for the foreclosure of the mortgage and the appointment of a receiver, and on that day said Patterson was appointed temporary receiver, and on the 9th of June, 1899, permanent receiver, of the property described in the mortgage. On the 16th of June, 1899, the superior court rendered judgment that unless the defendant company should on or before the 5th of July, 1899, pay the receiver the sum of \$345,628.53, with interest and costs, said property should be sold as an entirety at public auction on the 1st of August, 1899. On the 1st of August the receiver, in accordance with said judgment, sold said property for \$20,000 in cash to Samuel D. Coykendall, Henry C. Soop, and Edward S. Greeley, and the superior court on the 6th of October, 1899, passed an order accepting and approving the receiver's report of the sale and confirming the sale. After the purchase of said property the said Coykendall, Soop, and Greeley organized the Farmington Street Railway Company, and conveyed to it the property so purchased at the foreclosure sale; and said Farmington Street Railway Company, upon its application, showing that it had become the owner of all the bonds described in the complaint, was permitted to join as a party plaintiff in this action.

The said James T. Patterson and other claimants to the avails of said sale were, upon their several applications, permitted to intervene as parties; and upon the facts hereinafter stated, found by the commissioners appointed by the court, the following claims were allowed, and, by the judgment ordering the distribution of said fund, directed to be paid in the following order:

1. Of the State Treasurer for taxes for the year 1898.....	\$ 1,038 87
2. Of railroad commissioners for salaries	11 46
3. Claims for expenses of receivership and of State Treasurer while in possession of property.....	980 00
4. Of W. J. Carroll, assignee, for labor performed within three mos. from appointment of receiver.	56 64
	<hr/>
	\$ 2,086 97
5. Of certain named intervening supply creditors, as a class, for supplies essential to the operation of the road, furnished by them to the defendant company after January 1, 1898, and prior to February 4, 1899, amounting to	4,196 47
6. Of the plaintiff Mersick, trustee.....	4,304 04
consisting of these items:	
(1) \$2,855. 96 paid for wages of employees from November 12, 1898, to February 4, 1899.	
(2) \$1,448.08 paid for wages of employees and running expenses while trustee was in possession.	

Mersick v. Hartford, etc., Horse R. Co

7. Of James T. Patterson..... 16,303 55
 consisting of these items :
 (1) \$3,956.52 advanced to pay taxes April 14, 1898.
 (2) \$11,031.65 advanced in April, 1898, to pay employees, and
 other pressing claims against the company.
 (3) \$138.46, rent of Plainville line from February 4 to March
 4, 1899.
 (4) \$1,176.92, rent of Plainville line from June 18, 1898, to
 February 4, 1899.

Total claims ordered paid..... \$26,891 03

That the first four claims above named, amounting to \$2,086.97, are entitled to priority of payment over the bondholders, is not questioned.

As to the first item of the Mersick claim (\$2,855.96), it is found that when he took possession of the railroad there had been a strike of the employees because their wages had not been paid, and that it was practically impossible for the trustee to resume the operation of the road without first paying these employees their wages then due to said amount, for the period named in said item, and that at the request of the trustee that amount was advanced by Patterson, and paid to the employees entitled to the same.

The amount named in the second item of the Mersick claim (\$1,448.08) was, at the request of the trustee, advanced by Patterson, and used for the purposes stated in that item.

As to the first item of the Patterson claim (\$3,956.52), it is found he paid said sum to the State Treasurer for taxes due April 15, 1898, upon an understanding with the railroad company that he might hold the same as a preferred claim against the company, to the same extent that the State Treasurer would have held it, had the amount not been paid.

As to the second item of the Patterson claim (\$11,031.65), it appears that in April, 1898, Patterson advanced said sum to the railroad company to pay the employees of the company, and also certain pressing claims, some of which had been sued upon, and upon others of which suits were threatened, under an arrangement with the company that he should receive assignments of the claims and of the wages to be paid by the money so advanced by him. Under said arrangement he received—

Certain assignments of wages, dated from December 11, 1897, to April 12, 1898, amounting to.....	\$3,389 16
Assignments of wages by pay rolls dated from September 3 to November 5, 1898, amounting to.....	2,803 72
And assignments of accounts dated April 21 to May 19, 1898, amounting to.....	473 53
	<hr/> \$6,666 41

Concerning the third item of said claim (\$138.46), it is found that Patterson owned a line of street railway from Farmington to Plainville, built upon the right of way of the defendant company, under a contract by which the railroad company was to pay him \$1,800 a year rent, and that said sum

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is for the rent due under said contract from February 4 to March 4, 1899.

The fourth item (\$1,176.92) is for rent due under said contract from June 18, 1898, to February 4, 1899.

It is stated in the judgment file that the value of the property sold by order of court as above stated was, at the time of such sale, in excess of \$150,000. It appears that there was no evidence or admission of parties that said property was worth more than \$20,000, excepting that the petition of one of the intervening parties, containing such an allegation, was demurred to by the Farmington Street Railway Company, and said demurrer was sustained.

From the judgment directing the distribution and payment of the proceeds of the sale of the mortgaged property, the Farmington Street Railway Company appeals, upon the grounds, in substance, that the trial court erred in giving preference to said claims of the intervening supply creditors and to said claims of Mersick and Patterson, over the claims of said Farmington Street Railway Company, as the owner of all the bonds secured by the mortgage, and that the court also erred in basing its judgment in any part upon the fact stated in the judgment that the value of the mortgaged property at the time of the sale was in excess of \$150,000.

The plaintiff, Mersick, trustee, appeals upon the grounds that his claim should have been directed to be paid in the same order of preference as the charge of \$980 for expenses of the receiver and the trustee, and, if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply claims.

James T. Patterson appeals upon the grounds that his claims for \$3,956.52 for money advanced to pay taxes should have been given the same rank in order of payment as the state taxes named in the judgment, and that the remainder of his claim should have been directed to be paid in full after payment of the expenses of the receivership and the state taxes and the preferred claims for labor, and that, if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply claims.

Edward D. Robbins, for Farmington St. Ry. Co.

Howard H. Knapp, for Charles S. Mersick and James T. Patterson.

Henry G. Newton and Harrison Hewitt, for the Atlantic Refining Co. and others.

Joseph P. Tuttle, for John S. Parsons & Co. and others.

HALL, J. (after stating the facts). The mortgage to the plaintiff trustee was executed and recorded in accordance with the laws of this state permitting a street railway company to so mortgage all its property, including its franchise, to secure the payment of its bonds, and providing for the foreclosure of such mortgage in the same manner as ordinary

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mortgages of real estate. Gen. St. 1902, § 3848; *Whittlesey v. Hartford, P. & F. R. Co.*, 23 Conn. 421-435. The funds in the hands of the receiver represent the corpus of the property thus mortgaged. They are the proceeds of a sale of the mortgaged property under a judgment in an action instituted by the trustee of the bondholders after, as their authorized representative, he had taken possession of the same in accordance with the provisions of the mortgage, in which action he asked for the appointment of a receiver and for a foreclosure by sale. By the judgment of the superior court distributing these funds, the mortgagees of the railroad company receive no part of the proceeds of such sale made by the receiver by order of court, and approved and confirmed by the court; but the entire avails of the sale, after the payment of the expenses of the receiver and trustee, and certain unquestioned claims, are applied to the payment of the unsecured claims of the intervening supply creditors, and of *Mersick and Patterson*, before described, all of which were contracted since the execution of the mortgage, and before possession was taken for the bondholders.

It is the claim of the Farmington Street Railway Company, one of the appellants, and made a coplaintiff in the foreclosure suit since the commencement of that action, and now the owner of all the bonds secured by the mortgage, that neither the said supply creditors nor *Mersick* nor *Patterson* are entitled to payment of their claims from the proceeds of the sale of the mortgaged property until after payment of the mortgage debt; while said intervening supply creditors and *Mersick and Patterson* insist that their claims should take precedence, in order of payment, over the claims of the bondholders. As supporting this claim of the supply creditors and of *Mersick and Patterson*, and as sustaining the judgment of distribution in so far as it gives priority to the supply claims and to certain items of the claims of *Mersick and Patterson*, the leading case of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and numerous other cases which are said to follow the rule laid down in that case, are cited.

Assuming that the doctrine of *Fosdick v. Schall* regarding the respective rights of the mortgagees and of the unsecured creditors of a railroad company, as to priority of payment from the mortgaged property, or the proceeds of its sale, at the time the trustee for the bondholders or a receiver takes possession of the railroad, is the law of this state, it becomes important to ascertain, first, just what was decided in that case; and, second, whether the rule as there laid down is applicable to the facts of the present case. *Fosdick v. Schall* was decided in 1878. In the opinion by Chief Justice Waite it is said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements.

Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it is certainly not inequitable for the court, when asked by mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. * * *. This not because the creditors to whom such debts are due have, in law, a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original rights. * * *. While ordinarily this power is confined to the appropriation of the income of the receivership, and proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause the court is called upon to take income, which would otherwise be applied to the payment of old debts, for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not infrequently materially increased. * * *. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund, in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. * * *. Whatever is done, therefore, must be done with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of the restoration should be made to depend upon the amount of the diversion." In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, decided in 1884, it was held that a debt for current expenses, and payable from current earnings, the mortgage interest being then in arrear, was a charge in equity on the continuing income—"as well that which came into the hands of the court after the receiver was appointed as that before"—and that a diver-

sion of the current income for the improvement of the mortgaged property by the trustee in possession or by the receiver created in equity a charge on the property for its restoration in favor of the current debt creditor. The opinion concludes with the statement that it was only intended to decide what was decided in *Fosdick v. Schall*—"that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." In *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 658-673, 8 Sup. Ct. 1011, 1017, 31 L. Ed. 832, decided in 1888, the court, speaking by Justice Matthews, said: "But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its corpus; and it cannot be claimed that ordinarily the unsecured creditors of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself, over those creditors who are secured by prior and express liens." After stating that there are cases where, owing to special circumstances, unsecured creditors may be entitled to priority of payment, even from the proceeds of a sale of body of the property, citing *Fosdick v. Schall*, *Burnham v. Bowen*, and other decisions of the Supreme Court, the court says: "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham v. Bowen*" as follows; quoting the concluding words of the opinion in that case as above stated, and adding: "There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all." In *Kneeland v. American L. & T. Co.*, 136 U. S. 89-97, 10 Sup. Ct. 950, 953, 34 L. Ed. 379, decided in 1890, it is said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. * * * One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. * * * No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced." In *V. & A. Coal Co. v. Central Railroad, etc., Co.*, 170 U. S. 355-368, 18 Sup. Ct. 657, 661, 662, 42 L. Ed. 1068, decided in 1898, it was said that where the claim for supplies furnished to continue a railroad as a going concern was, as between the party furnishing them and the holders of bonds secured by a mortgage, a charge in equity on the continuing income, it was immaterial, "in determining the right

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to be compensated out of the surplus earnings of the receivership, whether or not, during the operation of the railroad by the company, there had been a diversion of income for the benefit of the mortgage bondholders," and, further, that "the dominant feature of the doctrine as applied in *Burnham v. Bowen* is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman, as against the mortgage bonds, in the income arising, both before and after the appointment of a receiver, from the operation of the property."

The cases above cited, and others upon the same subject, are reviewed in the recent cases of *Lackawanna, etc., Coal Co. v. Farmers' L., etc., Co.*, 176 U. S. 298-313, 20 Sup. Ct. 363, 44 L. Ed. 475, and *Southern Ry. v. Carnegie Steel Co.*, 176 U. S. 257-285, 20 Sup. Ct. 347, 358, 44 L. Ed. 458, decided in 1900, in the latter of which the court, in the opinion by Justice Harlan, says: "It may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company, contracted in the ordinary course of its business, shall be paid out of current receipts before he has any claim upon such income, * * * and that, when current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use." Debts contracted not in the ordinary course of the operation of a railroad, but for the purposes of construction, are not entitled to priority of payment over the mortgage debt, under the rule in *Fosdick v. Schall*. *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; *Lackawanna, etc., Coal Co. v. Farmers' L., etc., Co.*, supra.

From the language quoted from the cases above cited, it would appear that the foundation principle of the rule of *Fosdick v. Schall*, and the other cases referred to, by which a certain preference is given a particular class of unsecured creditors over the mortgagees of a railroad, is an agreement upon the part of such mortgagees, in accepting such security for the payment of the bonds, that current debts, contracted in the ordinary course of the business of the railroad company, shall be paid from the current earnings of the railroad before such mortgagees shall have any claim upon such income. It is by virtue of this implied agreement that the current debts, as between the supply creditors and the mortgagees, become a charge in equity upon the continuing income both before and after the appointment of a receiver, and whether or not there has been a previous diversion of

the income for the benefit of the mortgagee. But the superior equity springing from such implied agreement, in favor of the current-debt creditors, is in the current income derived from the mortgaged property, and not in the body of the mortgaged property itself. None of the cases above referred to go so far as to imply an agreement upon the part of the mortgagees, in accepting their security, that the body of the mortgaged property may be used to pay the current expenses of operating the railroad. The power of a court of equity to apply the corpus of mortgaged property to the payment of such unsecured claims against the railroad company is always made to rest upon the fact that in some manner the mortgagees have received the benefit of those earnings, which, by their implied agreement, should have been applied to the payment of current expenses.

We are not prepared to accept as law the rule which seems to have been adopted in some of the cases cited by counsel—that those who have rendered services or furnished supplies to keep a railroad in operation, even after the mortgage interest is in arrear, and the bondholders have the right to take possession under their mortgage, are entitled to priority of payment over the mortgagees from the corpus of the mortgaged property, or the proceeds of the sale thereof, when there has been no diversion of the earnings of the railroad to the benefit of the bondholders.

Assuming, without deciding, that the doctrine of *Fosdick v. Schall* is applicable to a street railroad like that of the defendants, how does it affect the rights of these intervening creditors? They are not asking that income in the hands of the receiver be used to pay their claims. There are no earnings of the railroad in his hands. The expense of operating the road during the receivership has exceeded the receipts. To entitle the interveners to payment from the proceeds of the sale of the mortgaged property, it must therefore be shown that there has in some manner been a diversion of the current income for the benefit of the mortgagees. But it does not appear that the mortgagees have received any part of the income of the road which should have been diverted to the payment of these claims, or that the action of the bondholders in taking possession of the road has prevented the payment of these claims from the earnings of the railroad. On the contrary, it appears that no interest has been paid on the bonds from the earnings of the railroad since August 1, 1896, and that since that time the receipts from the road have been inadequate for the payment of the ordinary operating expenses, and that large sums have been borrowed by the company to enable it to meet its current obligations. There has been no diversion, and there can be no restoration. The claims of the supply creditors and the principal part of the Patterson claim are not debts of the bondholders, but of the railroad company, contracted either upon the credit of the

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company itself, or upon the credit of its earnings. As there has been no diversion of such earnings for the benefit of the bondholders, there can be no payment of such claims, under the doctrine of *Fosdick v. Schall*, from the mortgaged property, or the money derived from its sale, until the mortgage debt is satisfied.

The claims described in the above statement of facts are entitled to priority of payment from the proceeds of the sale, over the bonds, only as below stated:

The first four claims named, amounting to \$2,086.97, are, as we understand, conceded to be privileged. As the last of these four unquestioned claims is the only one allowed by the trial court as a preferred labor claim, under section 1051 of the General Statutes of 1902, it is unnecessary to decide whether under that statute such a labor claim would be entitled to priority of payment from the proceeds of the sale of the mortgaged property, over the mortgage debt.

For the reason already stated—that there has been no diversion of income—none of the claims of said class of supply creditors, amounting to \$4,196.47, are entitled to preference over the mortgage bonds.

The entire claim of Mersick, trustee, amounting to \$4,304.04, is entitled to priority over the bonds, and should be paid as expenses properly incurred by the trustee while in possession of the mortgaged property for the benefit of the bondholders, and should stand in the same rank as to preference as the item of \$980, expenses of receiver and trustee.

It appears from the record that the second item of said claim of Mersick (\$1,448.08) was money paid by the trustee for wages of employees while the trustee was in possession, at the request of the bondholders, and under the mortgage, which expressly empowered him to “operate and conduct the business of said railroad company.” No question is made as to the reasonableness of the amount so paid.

The first item of Mersick’s claim (\$2,855.96) was money paid employees for wages, covering a period of about three months before the trustee took possession.

It is said that these claims of Mersick are made for the benefit of Patterson. The finding is that both these sums were advanced by Patterson at the request of Mersick. We must therefore treat them as money paid out by Mersick.

The mortgage deed under which Mersick, as trustee, took possession, expressly provides that “the trustee shall be entitled to be reimbursed for all outlays of whatever sort or nature to be incurred in this trust,” and that his “compensation and disbursements shall constitute a first lien upon the mortgaged property.” That this outlay for wages due employees before the trustee took possession was a reasonable outlay, and incurred in the trust, we must regard as determined by the finding that “it was practically impossible to resume the operation of said railroad” without first paying said “striking employees the wages then due them.”

Of the claim of James T. Patterson, only the third item (\$138.46), for rent of the Plainville line during the period the trustee was in possession, is entitled to priority of payment over the mortgage debt. That was a debt properly incurred by the trustee. As we read the finding, the trustee, while in possession through his agent, Patterson, operated the Plainville line in connection with and for the benefit of the mortgaged property, and under a contract to pay the above sum as rent. Upon the facts, this item of \$138.46 must be regarded as an expense properly incurred by the trustee while in possession for the bondholders, and should rank in order of payment with the other expenses of the trustee and receiver.

The first item of the Patterson claim, \$3,956.52, money advanced April 14, 1898, to the railroad company to pay taxes, is not a preferred claim over the mortgage bonds. Patterson was under no obligation to pay these taxes, and it does not appear that he was either requested or authorized to do so by the bondholders. It was the duty of the railroad company to pay the taxes, and Patterson, at the request of the company, paid its debt. The railroad company could not, by their agreement with Patterson, give him a lien or claim upon the body of the mortgaged property which would take precedence over that of the bondholders. The transaction was a loan by Patterson to the company, and he did not thereby acquire such a lien upon the mortgaged property as the state may have had. *Sperry v. Butler*, 75 Conn. 369-372, 53 Atl. 899.

For the reasons already given, neither the second item of the Patterson claim (\$11,031.65), money advanced by him to the company in April, 1898, to pay wages of employees, and other pressing claims against the company, nor the fourth item of said claim (\$1,176.92), for rent of Plainville line prior to the time the trustee took possession, are privileged claims over those of the bondholders.

After the payment of the claims as above directed, and to the plaintiff trustee of the costs and proper expenses of this appeal, the remainder of said funds in the hands of the receiver should be paid to the said Farmington Street Railway Company.

Apparently, the finding in the judgment file that the value of the mortgaged property at the time of the sale exceeded \$150,000 is not sustained by the record, from which it appears that no evidence was offered upon that subject, and that the demurrer to the pleading containing such an allegation was sustained.

There is error in the judgment distributing the proceeds of the sale of the mortgaged property, and said judgment is set aside, and the cause remanded for the entry of a judgment distributing said funds in accordance with the law as above stated. The other Judges concurred.

EUSTIS *v.* MILTON ST. RY. CO. HOLLINGSWORTH *v.* SAME.
WHITNEY *v.* SAME. KENNEDY *v.* SAME.

(Supreme Judicial Court of Massachusetts, Norfolk, June 18, 1903.)

[67 N. E. Rep. 663.]

Street Railways—Reservation of Space for Tracks—Additional Servitude.

St. 1895, p. 109, c. 121, forbidding the granting of any location for the track of any street railway in a certain locality, except in ways in which special space for the use of street railways shall have been reserved prior to the location of the tracks, and except within the limits of such reserved space, and authorizing the selectmen of the town to lay out such space, is not unconstitutional on the ground that it authorizes the imposition of an additional servitude without compensation.

Report from Supreme Judicial Court, Norfolk County;
Henry K. Braley, Judge.

Separate suits by Eustis, Hollingsworth, Whitney, and Kennedy against the Milton Street Railway Company. Cases reported. Bills dismissed.

M. Storey, J. L. Thorndike, and E. R. Thayer, for plaintiffs.

Gaston, Snow & Saltonstall, Warren & Garfield, and Malcolm Donald, for defendant.

KNOWLTON, C. J. The plaintiffs in these suits in equity seek to obtain an injunction against the defendant to prevent the construction of an electric street railway through Blue Hill avenue, in Milton. The plaintiffs are severally abutters upon the avenue, and owners of the fee to the center of the street. The defendant is acting under an order of the selectmen of Milton which established a location of the railway through the street. No question is made of the regularity of the proceedings before the selectmen, except that they were founded upon the authority of a previous order laying out and reserving a special space for the use of street railways, under and in accordance with the provisions of the St. 1895, p. 109, c. 121, and upon the action of the town accepting this order. It is contended by the plaintiffs that this statute is unconstitutional because it purports to authorize the imposition of an additional servitude upon the land previously taken for streets and highways in Milton, without providing for compensation to the owners.

This statute forbids the granting of any location for the track of any street railway in Milton, except in ways in which special space for the use of street railways shall have been reserved prior to such location of tracks, and except within the limits of such reserved space. It further authorizes the selectmen of the town to lay out, and the town to accept and allow, such space for the use of street railways in any townway or highway heretofore or hereafter laid out within the town. St. 1894, p. 341, c. 324 (Rev. Laws, c. 48, § 85), gives

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authority to the public officers who lay out streets, townways, or highways in the cities or towns which accept the act, to reserve special space for the use of persons riding on horseback, special space for the use of street railways, special space for drains and sewers and electric wires, and special space for trees, grass, and for planting. Under this last statute, damages are of course to be awarded according to the extent and nature of the way laid out, and the question in regard to constitutionality does not arise.

The question whether a particular use of a highway is authorized by the original appropriation of the property is often difficult to answer. In *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835, the rights of the public are defined as follows: "This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground, as well as upon or above it. Accordingly, it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph and telephone and electric lighting companies, and for water pipes, gas pipes, sewers, and such other similar arrangements for communication or transportation as further invention may make desirable. *Pierce v. Drew*, 136 Mass. 75 [49 Am. Rep. 7]; *Suburban Light & Power Co. v. Aldermen of Boston*, 153 Mass. 200 [26 N. E. 447, 10 L. R. A. 497]; *Attorney-General v. Railroad Co.*, 125 Mass. 515 [28 Am. Rep. 264]; *Howe v. Railway Co.*, 167 Mass. 46 [44 N. E. 386]; *Natick Gas Light Co. v. Inhabitants of Natick*, 175 Mass. 246 [56 N. E. 292]." See, also, *White v. Blanchard Brothers Granite Co.*, 178 Mass. 363-366, 59 N. E. 1025. In determining whether an additional servitude is imposed by the authorization of a new kind of use, the question is not whether the Legislature or the public authorities foresaw and contemplated the particular use in question, but whether it is fairly included in the purposes for which the property was originally taken by the public. Whenever a road is laid out, the officers who represent the public, and the persons whose property is taken, must be supposed to know that new modes of travel and new occasions for transporting peculiar kinds of property will be likely to come into existence. The primitive modes of locomotion along highways have largely given place to new vehicles for horses, and to electric cars, bicycles, and automobiles. The question as to each one of these is whether, with reasonable regulations, the method of travel is a reasonable and proper use of the highway, having reference to other

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proper uses of it which the public may have occasion to make. Some of these new modes of travel are so fraught with danger to others having rights in the way that they need to be carefully regulated for the protection of the public. In the absence of provisions for their regulation, some of them would doubtless be deemed unreasonable and improper, as too great an interference with the convenience and safety of persons using the streets in other modes.

In this commonwealth the rights of the public in seeking to take advantage of improvements in the use of the highways for travel and transportation have received liberal recognition by the Legislature and the courts, as is shown by the cases above cited. In the present case there is no feature which has not been covered by the previous decisions, except the authorization by statute of the reservation of special space for electric railways. Of the right of the Legislature, or of designated public officers, to regulate the use of streets by travelers in any reasonable way, there can be no doubt. From the earliest times it has been the custom to appropriate a part of each highway for travel with teams, and to leave other parts for public use in other ways. Sidewalks are constructed for the special use of pedestrians, and under recent statutes bicycle paths may be laid out. Rev. Laws, c. 48, c. 87. These are only reasonable regulations of the rights of the public. *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, *ubi supra*.

It is contended that the reservation of this space for electric railways near the side of the way, which is permitted by the statute, will put an unreasonable and additional servitude upon the plaintiffs' property. This contention may be considered in two aspects: First, in reference to the effect upon public travel; and, secondly, in reference to the effect upon the plaintiffs' right of access to the way. As to the first, we are of opinion that the reservation of this space for a public use does not necessarily or probably make the use of the street for travel by electric cars less safe and convenient for persons using the street for other modes of travel than if the tracks were in the part of the way constantly used by ordinary vehicles. Indeed, there is nothing to show that this is not a wise and proper arrangement for those who use the streets of Milton. In this aspect of the case, the regulation objected to puts no greater burden upon the land taken for streets than the laying of tracks in the part wrought for travel by horses and carriages.

There is nothing in the statute that implies an intention to interfere with the right of abutters to have reasonably convenient access to the street. The statute must be construed as preserving the landowners' freedom from any unreasonable interruption of this right of access. The construction of a sidewalk and gutter interferes somewhat with communication between abutting property and the center of a street;

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but no one would contend that for this reason the construction of a sidewalk, with suitable driveways across it, is an imposition of an additional servitude upon the land taken for public use. In the present case the rails are to be laid upon ties whose upper surface is not above the level of the ground, and the land adjacent to the tracks is to be smoothly graded on a level with the tracks. We see nothing to indicate that the construction of the tracks will involve any peril to travelers on the way, except that which is necessarily incident to a use of the street by electric cars, and we find nothing in the statute which justifies an unreasonable interference with the plaintiffs' right to have access to the street in proper places.

The law applicable to this class of cases has been considered at length in *Attorney-General v. Metropolitan Railroad*, 125 Mass. 515, 28 Am. Rep. 264; *Howe v. West End Street Railway*, 167 Mass. 46, 44 N. E. 386; and *White v. Blanchard Brothers Granite Co.*, 178 Mass. 363, 59 N. E. 1025. Although in some states the laws have been construed more strictly against street railways, we are of opinion that there is nothing in this case which should take it out of the rules laid down in the decisions above cited.

Bills dismissed.

THOMPSON v. LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Oct. 2, 1903.*)

[76 S. W. Rep. 44.]

Crossings—Duty to Maintain.

Where a railroad crossing was put down for the accommodation of a physician by a sectionman without consent or acquiescence on the part of the railroad company, and it was thereafter removed without having existed a sufficient length of time to warrant the implication of a grant, its existence did not impose on the railroad company the obligation of maintaining a crossing at that point.

Same—Same.

A provision in a railroad's charter requiring it to establish suitable wagon crossings did not require it to maintain a crossing for the accommodation of a lot owner, who only owned land on one side of the railroad, where the crossing, if maintained, would not have afforded access to a highway or other land over which the owner had a right to pass.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Action by Mary E. Thompson against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. P. Thompson, for appellant.

W. C. McChord, for appellee.

BURNAM, C. J. The appellant, Mary E. Thompson, instituted this suit to compel the appellee, the Louisville &

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Nashville Railroad Company, to put down a crossing for her over its tracks in front of her house and lot near the town of St. Mary's, in Marion county. She alleges in her petition that she owns and occupies a house and lot on the southwest side of the tracks of the defendant road by purchase from F. P. Browning, who inherited it from his father, F. P. Browning, and that during his occupancy there was a crossing at the point, which was taken up by the defendant for the purpose of repairing the track, with the promise to restore it, which has not been done. In an amended petition, which she was not permitted to file, she alleges that there is an open passway over defendant's right of way on the northeast side of the track from their depot down past her lot, which the public have used in going from the depot to the stock pens of defendant for many years. The railroad company for answer say that neither the appellant nor any of the persons under whom she holds title ever owned lands on both sides of defendant's right of way, and denies that it ever constructed or provided a crossing over its tracks at the place named in the petition, or that it was removed with a promise that it should be restored; and further allege that their stockyard pens, etc., are located immediately opposite plaintiff's property, and that the main and two switch tracks lie between them, and that a crossing at the point indicated would not land on any public road or passway, and that connection could only be had therewith by passing over their right of way and through their stockyards, and that plaintiff can obtain a right of way to the public road over the lands of persons on the same side of the railroad track on which her house is located. The pleadings being made up and proof taken, the circuit judge dismissed plaintiff's petition, and she has appealed.

Dr. C. T. Blanford testifies that about 25 years previous to giving his deposition he occupied the premises now belonging to the plaintiff, as a tenant of one of her remote vendors, for two years, and that while he lived there, at his suggestion, and for his accommodation, one of the sectionmen of the defendant made him a crossing over the track of the railway company, which he used during his occupancy of the property; that this was a mere accommodation on the part of the sectionman. The testimony shows that it was soon taken up. After this time the additional switches for the use and convenience of shippers of live stock from the stock pens were put in at this point, and it is perfectly apparent that a crossing at the point desired would more or less inconvenience the railroad company, and would not be free from danger to the user. There is no claim of a grant from appellee, or contention that the crossing at that point has existed for such length of time as the law will imply a grant. It is true that defendant's charter required that when they shall construct their road through the land of another person, that it shall be their

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duty to provide for such person proper wagonways across their road from one part of the land to another. It appears that this railroad was constructed in 1856 and 1857, and that at the time John K. Miles owned a considerable boundary of land on both sides of the railroad, of which the lot of plaintiff formed a part, which he afterwards subdivided, and sold into lots. At the time the road was constructed, Miles would have had the right, under the charter of the company, to have required wagon crossings to be established at suitable places, to enable him to get from one part of his place to another, and no doubt such crossings were established when the road was built. But this section of the charter would not apply to a lot of one acre sold from the Miles tract nearly 50 years after the building of the road, and where the owner and occupant only owned land on one side of the railroad. We think the trial court properly refused to grant the relief prayed.

Judgment affirmed.

In re MIFFLINVILLE BRIDGE.

(*Supreme Court of Pennsylvania, June 2, 1903.*) .

[55 Atl. Rep. 1122.]

Grade Crossings—Application of Statute—Relocation of Existing Highway.

Act 1901 (P. L. 531) provides that railroad crossings of highways hereafter established shall, except in certain cities, be above or below the grade thereof: *held*, that the fact that a grade crossing of a railroad over a highway is incidental to the relocation of an existing highway under the act of 1836, giving the court of quarter sessions jurisdiction in such matters, does not relieve such crossing from the provision of section 1 of the act of 1901, providing that all crossings hereafter established shall be above or below grade.

Same—Remedies—Petition—Injunction.

In a petition under Act June 7, 1901, to locate a grade crossing of a railroad over the approach to a county bridge, it was alleged that the railroad tracks were so far removed from the bridge as to be under the control of the township authorities, who were not before the court, and not of the county commissioners, who had charge of the erection of the bridge: *held*, that a decree dismissing the petition on the ground that the proceedings in the quarter sessions under Act 1836 (P. L. 555) were conclusive should be affirmed by reason of the facts in the case, and defendant railroad company related to a bill of injunction to restrain the highway commissioners from so constructing the bridge as to cross the railroad at grade.

Appeal from Court of Common Pleas, Columbia County.

In the matter of the petition to regulate a grade crossing at Mifflinville Bridge. From a decree dismissing the petition, defendant Pennsylvania Railroad Company appeals. Affirmed.

The following is the opinion of the court below, filed by Little, P. J.:

“This is a proceeding instituted by the county commis-

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sioners under Act 1901, § 4 (P. L. 531), which, by its terms, became effective on June 1, 1902. The petition recites that under certain proceedings had in the court of quarter sessions for the location of a county bridge across the Susquehanna river at Mifflinville, the proceedings of such county bridge were confirmed absolutely on July 7, 1902. The petitioners further aver in their petition that the southern end of the bridge crosses the tracks of the Pennsylvania Railroad Company. It also recites further proceedings had by the county commissioners for the construction of the bridge and other matters, and prays for the court to make an order to establish a grade crossing of the railway, and for gates, signals, and other safeguards to be maintained by the railroad company, and assigns nine separate reasons why the court should make the order asked. Answer was filed by the Pennsylvania Railroad Company, respondent, and a hearing was had. Upon the hearing testimony was offered on the part of the petitioners respecting the desirability and the necessity of a crossing at grade of the right of way of the railroad company. The respondents offered testimony as to the desirability for an overhead crossing. From the evidence produced at the hearing it appears that on July 29, 1902, the commissioners entered into a contract with one Charles H. Reimard for the construction of the bridge and the approaches thereto as far as the wing walls, and that the same be completed by August 1, 1903, for the price of \$93,985. The contractor is actively engaged in the construction of the bridge. The proposed bridge is so designed as to meet the highway on either side of the river at grade. In order to do this, the floor at the southern or Mifflinville end of the bridge will be six feet or more higher than the floor at the northern abutment. The respondents' proposed plan for an overhead crossing of the tracks of their railroad, affording nineteen feet in the clear above the level of the tracks at the point, involves an addition to the height of the piers of the bridge as already planned and contracted for, by the addition of steel cylinder piers three-eighths of an inch in thickness, securely fastened to the piers designed, and to be filled with concrete, and the floor of the bridge placed upon an incline from the northern to the southern abutment. The addition added to the southern pier will be some eighteen or more feet in height, and also the construction of an additional pier on the south side of the railroad company's right of way. That the increased cost of the construction will be some \$16,300, of which sum the respondents have offered to the county commissioners to contribute the sum of \$12,000.

"We are of the opinion that the act of 1901 (P. L. 531) under which this proceeding was instituted has no application to the facts here. The purpose of the act was not to abolish all grade crossings. The act is entitled 'An act relating to railroad crossings of highways, and for the regulation, alter-

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ation and abolition of grade crossings, except in cities of the first and second classes.' Its first section provides: 'That, except as in this act elsewhere provided, all crossings, hereafter established, whether of highways by railroads or of railroads by highways, shall, except in cities of the first and second classes, be above or below the grade thereof.' The second section relates to railroad companies constructing new lines of railroad. And the third section provides: 'Every municipality or other authority, hereafter constructing a highway, * * * across an existing railroad, shall construct the same above or below the grade thereof, unless permitted, in the manner hereafter provided, to construct the same at grade, and the cost of said work shall be paid one half by said municipality and one half by the railroad company owning said railroad.' Its fourth section provides: 'Whenever it shall be desired by any railroad company, constructing a new railroad, or by any municipality or authority, constructing a new highway, except in cities of the first and second classes, that the railroad or highway should be so constructed that the railroad and highway shall cross each other at the same grade, a petition shall be presented by the party desiring such construction to the court of common pleas of the district within which said crossing is situated, upon ten days' notice to the corporation owning said railroad or to such municipality or authority, describing the proposed construction, and setting forth the reasons that are supposed to make the same necessary and desirable; and the court of common pleas shall thereupon have jurisdiction of the parties and the subject-matter of such petition, and may proceed summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master or commissioners, or otherwise, and if satisfied that such construction is reasonably required to accommodate the public or to avoid excessive expense in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such orders, in its discretion, prescribe what gates, signals or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by the statute; and all such orders shall be binding upon the parties, and shall be observed by them; all costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas, and shall be paid by such party as it shall decide, or be by it apportioned between the parties, and may be collected by execution out of said court.' The tenth section of the act briefly provides that 'nothing in this act shall prevent any railroad company from laying additional tracks on crossings previously existing, or from constructing switches and sidings

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and branch lines from their lines of railroad, now or hereafter constructed, to any mill, factory or other manufacturing establishment, * * * or from laying additional tracks to increase their yard facilities at terminal or other points, across public highways at the grade thereof, outside of the corporate limits of cities of the first and second classes; but such sign posts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways.' It will be observed that this act relates to crossings hereafter established, first by railroad companies constructing new lines of railroad and any municipality hereafter constructing a new highway, while the tenth section allows crossings at grade of highways by railroad companies as mentioned in that section. There is nothing in the act which in any way interferes with the jurisdiction of the court of quarter sessions under the act of 1836 (P. L. 555). The jurisdiction of the court under that act could not be interfered with except by some express legislative provision. The proceeding for the location of this Mifflinville bridge was not a proceeding for the location of a highway under general law, but for the location of a county bridge to connect parts of an existing highway under the thirty-fifth, thirty-seventh, and thirty-eighth sections of the act of 1836 (P. L. 560, 561).

"A petition was presented to the quarter sessions, asking for the appointment of viewers 'for the location of a bridge 'over the north branch of the Susquehanna river * * * at a point where said river crosses the public road or highway leading from a point in the public road between Bloomsburg and Berwick, near the village of Willow Grove, to the village of Mifflinville.' At the next February sessions, 1901, the viewers made report in favor of the bridge, and under the powers conferred upon them by the thirty-seventh and thirty-eighth sections of the act they further reported: 'That we have carefully examined the routes of the road crossing the said river over which the bridge is prayed for, and are of the opinion that the changes or variations in the bed of the said road would be an improvement and saving of expense in the erection of said bridge, which variations we have caused to be accurately surveyed, and have returned a plot thereof with this our report, said changes being as follows: * * * At the southern end of said proposed bridge, beginning at a point in the northern line of First street in the village of Mifflinville, 270 feet west of the western line of Market street; thence across the village common north, twenty-one degrees west, 139 feet, to the right of way of the N. & W. B. R. R. Company; thence crossing said right of way at grade north, twenty-one degrees west, 130 feet to the southern abutment of said bridge, said abutment standing on said commons at high-water mark.' The viewers were authorized to make that change in the highway. The statute gives the bridge

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viewers authority to report also whether any change in the course or bed of the road to be connected therewith will be necessary in order to the erection of said bridge at the most suitable place or in the best manner, * * * and cause every such variation to be accurately surveyed, etc. Sections 37, 38, Act 1836 (P. L. 561). There is no ground for the contention now made that the road, as shown by the draft accompanying the report of viewers, from First street in Mifflinville to the southern abutment of the proposed bridge, is a new road. The case *In re County Bridge* (Pa.) 24 Atl. 695, was one in which the viewers exercised the powers of changing the bed of the highway, as was done by the viewers in the present proceedings. The second exception to the report of viewers there alleged that the viewers unlawfully laid out two entirely new roads, and vacated no part of the old highway. The exceptions were dismissed, and the report confirmed absolute. The order was affirmed by the Supreme Court. This action of the viewers did not lay out a new or additional public road, or establish a new or additional grade or other crossing of the tracks of the railroad company. The result of their action on the south side was to change the bed of this previously existing road leading from the village on the south side of the river to the north village on the north side, where it intersects First street in Mifflinville, westwardly far enough to be in line with the southern abutment of the proposed bridge. In this highway between the two villages there has been a grade crossing for a number of years. Probably it was located and constructed when the railroad company laid its tracks at the grade of that highway, and when the bridge viewers made this change in the bed of the road the crossing was thereby changed as a necessary incident to the use of the highway as changed. The words employed by the viewers, 'thence crossing said right of way at grade,' have no special significance. They are rather descriptive of what the viewers saw as forming part of the highway. While a county bridge is a part of the highway, yet this act of 1901 does not require an over or under crossing where, as in this instance, a grade crossing has long since been in use in the highway, parts of which the bridge was designed to connect. The judgment of confirmation absolute of these bridge proceedings July 7, 1902, became conclusive, unless appeal was duly taken. The bridge was established by that decree. The duty devolves upon the county to build and keep this and all other county bridges in repair, as well as the approaches thereto. The approach to the bridge is a part of the bridge itself. The township road terminates where the approach begins. *In re Catawissa & Main Twp. Road*, 17 Pa. Super. Ct. 21; *Westfield Boro. v. Tioga County*, 150 Pa. 152, 24 Atl. 700. This road leading from the village on the south to the north side of the river, the bed of which is changed, will be required to be taken care

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of by the supervisors of the respective townships, as formerly. It is a mistaken view urged on the part of the petitioners that the southern approach of this bridge extends to First street.

"Being of the opinion that the decree of the court of quarter sessions confirming these bridge proceedings is now conclusive, and, in view of what the county commissioners have done subsequent to that decree, that certain rights of the contractor have attached, we should feel reluctant to make any changes in the construction of this bridge, unless great necessity required it, even if there were a statute which expressly provided for such change. The respondent's proposition involves a change in the proposed construction as already planned and designed. By reference to the testimony of Oscar Thompson, a witness produced by the respondent, this change would appear to be of doubtful propriety. The respondent's proposed change of this bridge so as to accommodate an overhead crossing would greatly enlarge the bridge, and increase the cost of its construction. It has been held that 'where a bridge is to be enlarged or improved, viewers should be appointed as for a new bridge.' *Riddle v. County Com'rs*, 3 Delaware County Rep. 165. The circumstances here show that the second section of the act of April 11, 1848 (P. L. 507), would present another barrier to the accomplishment of such purpose, because the contractor and county commissioners have not agreed to the proposed alteration. The point of crossing of the railroad company's right of way can be observed for quite a distance eastwardly, and at a much greater distance westwardly. The court of common pleas will make no order which will in any way affect the judgment of the court of quarter sessions entered July 7, 1902. And therefore, for the reasons hereinbefore given, it is now ordered that these proceedings be dismissed, at the cost of the county of Columbia."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

H. M. Hinckley and L. E. Waller, for appellant.

Herring and J. B. Robinson, for appellee.

PER CURIAM. The settled policy of this state, legislative and judicial, is against the further increase of grade crossings. The act of June 19, 1871 (P. L. 1361), gave the courts jurisdiction over crossings of one railroad by another at grade, and this court has more than once expressed its regret that the control did not extend to the crossing of a railroad and an ordinary highway. This control the act of June 7, 1901 (P. L. 531), has now given. Any grade crossing which thereafter comes before the court, comes with a heavy burden of proof upon it.

Under the conceded facts the crossing involved in this controversy is a new grade crossing, and as such is prohibited by

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the act of 1901. The fact that it is incidental to the relocation of an existing highway under the authority of the act of 1836 does not relieve it of the ban of the act of 1901. The language of section 1 of the latter act is that "all crossings hereafter established" shall be above or below grade. This is a crossing in a different place, and is therefore "established" after the date of the act. The command of section 1 is peremptory and universal except in the single instance specifically prescribed. The court of common pleas is authorized under section 4 to permit a grade crossing under certain conditions. But this jurisdiction must be exercised in the mode pointed out by the statute, and is exclusive. There is no substitute for it, either in manner or form. The proceedings in the present case in the quarter sessions to authorize the bridge and the relocation of the old highway were wholly irrelevant. They were in a different court having no jurisdiction over this subject, and the accidental fact that both courts were held by the same judge did not mingle or combine their separate jurisdictions. The discretion of the common pleas under the statute can only be exercised in a direct proceeding for the purpose in the proper court.

A technical objection to a review of the decree is based on the ground that the appellant, in its answer, asked that the petition be dismissed, and that the prayer was granted. With the reasons given by the court in its opinion it is said we have no concern. This point is not free from difficulty. In an action at law the opinion of the court is not part of the record, and the judgment is the only matter strictly reviewable. In a proceeding in equity the rule is otherwise, and the chancellor's reasons are proper subject of consideration. The proceeding in the present case was unknown to the common law, and the statute, by committing it to the discretion of a judge, who may proceed summarily in such manner as he thinks best, and by the latitude of powers with which it invests him, and in other ways, has assimilated it closely to a proceeding in equity. Whether, therefore, we might not take up the case as if upon an appeal in regard to an injunction is far from clear. But some questions have been raised as to the facts. It is said that the duties of the county commissioners end at the bridge, and the railroad tracks are so far from it that the construction of the crossing will be the work of the township authorities, who are not before us. Under these circumstances we have thought it best, without deciding the other question, to turn over the appellant to the more plastic and convenient remedy of a bill to enjoin the construction of the bridge in such manner as will require the highway to cross the railroad at grade.

This appeal is therefore dismissed, without prejudice.

DALY v. MILWAUKEE ELECTRIC RY. & LIGHT CO.*(Supreme Court of Wisconsin, Oct. 20, 1903.)*

[96 N. W. Rep. 832.]

Street Railroads—Use of Streets—Operation of Freight Cars—Want of Authority—Nuisance—Injuries to Pedestrians—Complaint—Averment of Negligence—Necessity.

Where a street railway company operated freight cars over its tracks without authority and in violation of law, the operation of such cars constituted a nuisance, for which a pedestrian injured thereby was entitled to recover without regard to the care exercised in operating such trains, and hence a complaint alleging such operation a special injury was not demurrable for failure to allege negligence in the operation of such cars.

Appeal from Circuit Court, Milwaukee County; Lawrence W. Halsey, Judge.

Action by James Daly against the Milwaukee Electric Railway & Light Company. From an order overruling a demurrer to plaintiff's complaint, defendant appeals. Affirmed.

This is an appeal from an order overruling a demurrer to a complaint which alleges, in effect, that the plaintiff is an infant eight years of age; that his father was duly appointed his guardian herein; that the defendant was duly incorporated under the statutes of this state, and at all the times mentioned authorized to operate street railways therein, and particularly in the city of Milwaukee; that the defendant derived its authority from certain ordinances of the city; that among others the defendant had a double-track street railway on Wells street from Eleventh street west to the city limits, upon which to run its cars, under the provisions of the ordinance, which, among other things, provided that "the said tracks and railway shall be used for no other purpose than the transport of passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways"; that such provision has continued and remained in full force, and is a limitation upon the use which may be made of such tracks, and that no right has ever been granted in any form to the defendant to operate cars upon any of its tracks in the streets in the city of Milwaukee except for carrying passengers; that during the year last preceding at frequent, but irregular, intervals, the defendant ran a large number of its trains upon its tracks in the city—including those on Wells street—propelled by electricity, adapted solely for carrying freight and heavy material, carrying no passengers, nor stopping to receive or discharge passengers, but running continuously from their starting point to their destination in the manner of ordinary freight trains, used only for carrying freight and heavy material for compensation or profit to the defendant, such freight and material being carried to and from places outside the city; that such freight trains so run in the streets of the

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city were dangerous to the community, and especially to children lawfully upon such streets, and that they have been so run by the defendant wholly without authority of law, and in direct violation of law; that November 18, 1902, the defendant ran one of such trains consisting of five of such freight cars which had brought freight and heavy material over Wells street from beyond the city limits to some place in the city, and which was engaged in such traffic, and for the purpose of further hauling freight and material from beyond the city to some place within the same, said cars then being empty, westwardly on Wells street, without any authority and in direct violation of law; that such train was so run at a very high and dangerous rate of speed along such public street, passing street crossings at very frequent intervals, without giving signals, through a populous part of the city, passing schoolhouses when children were on their way home from school; that the plaintiff then being lawfully upon said Wells street, seeking to cross the same, and exercising due care for one of his age, at the intersection of Twelfth street, was struck by said freight train of the defendant and thrown down thereby, partly under the wheels thereof, and one of his legs was crushed so that it had to be amputated, and a portion of his foot of the other leg lacerated, crushed, and torn so that a large part thereof had to be removed, subjecting the plaintiff to great pain and suffering, and crippling him for life, to his damage.

Spooner & Rosecrantz, for appellant.

Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

CASSODAY, C. J. (after stating the facts). Counsel for the defendant contend that the complaint fails to state a cause of action because it does not specifically allege any negligence of the defendant in operating the train or in the construction of the cars or the track or otherwise. It does allege that the defendant was only authorized to use its tracks and railway for transporting passengers. Had the injury resulted from the use of such passenger cars, there might have been some force in the objection. *Chicago & Eastern Illinois R. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Randle v. Pacific R. R.*, 65 Mo. 325. But the gravamen of the complaint is that the plaintiff was injured by reason of the defendant running freight cars upon its tracks without authority and in violation of law. The question whether an indictment would lie at common law against a corporation for a misfeasance was answered in the affirmative by the Queen's Bench many years ago. *The Queen v. Great North of England Ry. Co.*, 9 Queen's Bench, 315, 325. In that case it was said by Lord Denman, C. J., that "a corporation * * * may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." *Id.* 326. Thus, it has been held in Massachusetts that "a

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railroad laid out over and along a highway in such a manner as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance." *Commonwealth v. Old Colony & Fall River R. R. Co.*, 14 Gray, 93. See, also, *State v. Troy & Boston R. R. Co.*, 57 Vt. 144; *Evans v. The C., St. P., M. & O. R. Co.*, 86 Wis. 597, 603, 57 N. W. 354, 39 Am. St. Rep. 908. So it is well settled that if an individual, without fault on his part, suffers special damage by any unlawful act in obstructing a highway, he has a right of action therefor, although the party doing the act is also liable to an indictment for the same. *Thayer v. Boston*, 19 Pick. 514, 31 Am. Dec. 159; *Zettel v. The City of West Bend*, 79 Wis. 316, 319, 48 N. W. 379, 24 Am. St. Rep. 715, and cases there cited. Thus it has been held in New York that "the construction and maintenance of a street railway by any individual or association of individuals without legislative authority is a public nuisance, and subjects those maintaining it to a private action in favor of any person sustaining special injury therefrom." *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307. To the same effect, *Beekman v. Third Avenue R. R. Co.*, 153 N. Y. 144, 152, 47 N. E. 277; *Borough of Stamford v. Stamford Horse Ry. Co.*, 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *Wellcome v. Inhabitants of Leeds*, 51 Me. 313, 315. To the extent that the defendant exceeded its authority by running freight cars over its tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly. This has, in effect, been repeatedly held by this court. *Evans v. The C., St. P., M. & Omaha R. Co.*, 86 Wis. 597, 603, 57 N. W. 354, 39 Am. St. Rep. 908; *Linden Land Co. v. Mil. El. Ry. & L. Co.*, 107 Wis. 493, 513, 83 N. W. 851; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. Thus it is stated by a standard text-writer "that for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted; and no degree of care on the part of the person erecting or maintaining the nuisance will exempt him from liability." 2 Wood on Nuisances (3d Ed.) § 703. The theory is that, the act being wrongful, the party doing it is answerable for all the consequences that flow therefrom to a person who is not chargeable with negligence by reason of which the injury is inflicted. *Id.* The allegations of the complaint, if true, are sufficient to authorize a jury to find that the plaintiff's injuries were without fault on his part, and were actually caused by the running of the freight cars on the defendant's tracks in violation of law; and hence the complaint states a cause of action.

The order of the circuit court is affirmed.

SMITH *et ux.* v. PENNSYLVANIA R. CO.*(Supreme Court of Pennsylvania, May 4, 1903.)*

[55 Atl. Rep. 768.]

Eminent Domain—Witnesses—Competency.

In condemnation proceedings, witnesses who were familiar with the tract for 34 years, and knew the character of the land and the improvements upon it, and who testified that they knew the value of the land in the community, acquired by knowledge of sales of the land, were competent to testify as to the damages.

Appeal from Court of Common Pleas, Chester County.

Action by David L. Smith and wife against the Pennsylvania Railroad Company. From the judgment, defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John J. Pinkerton, for appellant.

Wilmer W. MacElerey and Joseph H. Baldwin, for appellees.

MESTREZAT, J. The only question in this case requiring consideration is the competency of Frank Russel and Clarence Hope, two witnesses called by the plaintiffs to establish the value of the land before and after the construction of the defendant's railroad over it. It is contended by the defendant that these witnesses did not show sufficient knowledge of the property and of the values of land in the neighborhood to qualify them to place an estimate on the plaintiffs' land. This contention is supported by the excerpts from the testimony of the two witnesses quoted in the defendant's brief, but it is not sustained by the whole of their testimony. One of the witnesses had lived in the neighborhood of the land and had known it for 34 years; the other witness, all his life. They were familiar with the entire tract during this time, knew the character and quality of the land and the improvements upon it at the time a part of it was appropriated by the defendant company in the construction of its railroad. They also knew the manner in which the railroad passed through the land, and its proximity to the buildings. They visited the premises frequently, and passed them several times each year. In addition to the thorough knowledge they possessed of the land and its improvements, they each testified they knew the value of the land in the community in which the property was situated. This information was acquired by a knowledge of sales of land, and what it was held at by the owners. It is true they knew of very few sales, but, as was disclosed by defendant's witnesses, this was because there had been very few sales of recent date in that neighborhood. Both witnesses lived in a village of a few hundred inhabitants near the land, and, as appears by the testimony, they heard

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the value of this and other lands discussed in the places of business there. One of the witnesses said that when a sale of property took place in the community it was "the principal topic of conversation" in the village.

We are satisfied that the witnesses disclosed sufficient knowledge to qualify them to place an intelligent estimate on the land of the plaintiffs injured by the construction of the defendant's road, and therefore the judgment is affirmed.

BIRMINGHAM TRACTION CO. v. REVILLE.

(*Supreme Court of Alabama, Feb. 28, 1903.*)

[34 So. Rep. 981.]

Injury to Street Car Conductor—Derailment—Defective Switch—Negligence—Sufficiency of Complaint.

Where, in an action for injuries to a street railway conductor by the derailment of a car at a switch, the complaint charged that the want of a spring at the switch, or other appliance to hold the switch rail in position, was a defect in defendant's ways, and that such defect had not been remedied by reason of the negligence of defendant, and that such defect was the cause of plaintiff's injury, the complaint presented an issue of fact, as to whether the want of such appliance constituted a defect in the track or switch, and was therefore not demurrable.

Same—Same—Same—Approval by Engineer—Sufficiency of Plea.

In an action for injuries to a street railway conductor by reason of an alleged defective switch, a plea alleging that the line was constructed under a contract with the city, under supervision of the city engineer, and that the switch was approved by such city engineer, and was first-class in every respect, was demurrable, since, if the switch was defective, its approval by the city engineer was no defense, and, if it was not defective, the matter covered by the plea was included in the general issue.

Same—Same—Same—Negligence—Evidence.

Where plaintiff alleged that he was injured by derailment of a street car, caused by the fact that the track at the point of derailment was out of gauge, evidence that defendant's employee intrusted with seeing that the track was in proper condition was notified that the track was out of gauge, and his response thereto, showing that he understood the existence of the fact stated, was admissible.

Same—Same—Same—Question for Jury.

In an action for injuries to a street car conductor, caused by derailment at a switch, evidence that, by reason of defendant's failure to have the switch tongue fitted with a spring, it would become loose, and on numerous occasions the jarring from the front trucks of a car would turn the switch so that the rear trucks would leave the main track, which occurred on the occasion in question, presented a question for the jury, as to whether the switch as constructed was not defective, and, if so, whether such defect was the proximate cause of plaintiff's injuries.

Same—Same—Question for Jury.*

Where, in an action for injuries to a street car conductor by derail-

*As to the liability of railroad companies for injuries to employees from unsafe tracks and roadbeds, see *Murray v. Boston & M. R. R.* (N. H.), 7 R. R. R. 623, 30 Am. & Eng. R. Cas., N. S., 623 (obstructions near track); *Sankey v. Chicago, R. I. & P. Ry. Co.* (Iowa), 6 R. R. R. 306, 29 Am. & Eng. R. Cas., N. S., 306 (ice on

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ment of his car, there was evidence that the track at the point of derailment was out of gauge, and that such defect was the proximate cause of the injury, as alleged, defendant was not entitled to an affirmative charge on such issue.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by J. H. Reville against the Birmingham Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint contains six counts, but the plaintiff withdrew all of them except the first, third, and sixth, and the general affirmative charge was given for the defendant as to the third count; leaving only the first and sixth counts.

The first count avers the operation of a street railroad by the defendant, and the employment of plaintiff as a conductor on one of its electric cars, and avers that said car, while passing a switch on Eighth avenue, was derailed, and the plaintiff was injured; and then said count continues as follows: "Plaintiff avers that said injuries were caused by the negligence of the defendant, in this: that a part of its ways or works used by the defendant in its business of operating said street car line were defective, in this: that there was no spring at said switch, or other proper appliance by which the point of the switch rail was kept in its proper position, so as to allow its cars to pass without becoming derailed. And plain-

switch track); monograph appended to *Kilpatrick v. Choctaw, O. & G. R. Co.* (C. C. A.), 6 R. R. R. 501, 29 Am. & Eng. R. Cas., N. S., 501 (unblocked frogs, and guard rails); monograph appended to *Dolan v. Sierra Ry. Co. of California* (Cal.), 2 R. R. R. 875, 25 Am. & Eng. R. Cas., N. S., 875 (trestles and bridges); *Smith v. Erie R. Co.* (N. J.), 4 R. R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793; footnote appended to *Choctaw, O. & G. R. Co. v. McDade* (C. C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413 (proximity of water spout); *Peters v. McKay* (Cal.), 3 R. R. R. 173, 26 Am. & Eng. R. Cas., N. S., 173; *Miller v. Great Northern Ry. Co.* (Minn.), 3 R. R. R. 371, 26 Am. & Eng. R. Cas., N. S., 371 (bridge); *Northern Pac. Ry. v. Perry* (C. C. A.), 5 R. R. R. 177, 28 Am. & Eng. R. Cas., N. S., 177 (proximity of water tank); notes, 12 Am. & Eng. R. Cas., N. S., 652 (absence of bunters at end of track); 16 Am. & Eng. R. Cas., N. S., 570; 12 Am. & Eng. R. Cas., N. S., 668; 16 Am. & Eng. R. Cas., N. S., 319 (insufficient space between tracks); 12 Am. & Eng. R. Cas., N. S., 555 (overhead structures); 11 Am. & Eng. R. Cas., N. S., 453 (structures near track); 20 Am. & Eng. R. Cas., N. S., 107; 16 Am. & Eng. R. Cas., N. S., 839; 17 Am. & Eng. R. Cas., N. S., 428 (duty to ballast side tracks); 9 Am. & Eng. R. Cas., N. S., 832 (structures near track); 20 Am. & Eng. R. Cas., N. S., 107 (track owned by another company); 14 Am. & Eng. R. Cas., N. S., 748 (structures near track); *Southern Ry. in Kentucky v. Cooper* (Ky.), 21 Am. & Eng. R. Cas., N. S., 231 (injury to brakeman from defective railing on bridge, while alighting); *Williams v. Del. L. & W. R. Co.* (N. Y.), 10 Am. & Eng. R. Cas., N. S., 147 (injury to employee by low bridge); *New York, C. & St. L. R. Co. v. Oatman* (Ind.), 6 Am. & Eng. R. Cas., N. S., 588 (injury to employee by obstruction near track); *Voorhees v. Lake Shore & M. S. Ry. Co.* (Pa.), 16 Am. & Eng. R. Cas., N. S., 316 (insufficient space between sidings); *Linck v. Louisville & N. R. Co.* (Ky.), 16 Am. & Eng. R. Cas., N.

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tiff avers that the above-named defective condition arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in its employment, and intrusted by it with the duty of seeing that a spring or other proper appliance was used in connection with said switch, so as to hold the switch point in its proper position. Wherefore plaintiff sues and claims damages as aforesaid." The sixth count adopts the preliminary averments of the 1st count, and then continues as follows: "Plaintiff avers that his said injuries were proximately caused by the negligence of the defendant, in this: that a part of its ways were defective, namely, its track at or near the point where said car became derailed; that the defect consisted in this: that said track was not in proper gauge; and plaintiff avers that the defective condition above mentioned arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in its employment, intrusted by it with the duty of seeing that said track was in proper condition."

The defendant demurred to 1st count upon the following grounds: "(1) The negligence alleged is averred in the alternative, in that it is charged that the ways were defective because there was no spring at said switch, or other proper appliance by which the point of the switch rail was kept in its proper position, so as to let cars pass without becoming derailed, and it is not shown, and the court does not take

S., 831 (liability for injury to servant caused by his stumbling over an obstruction on track of which he had no notice); *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 137 (liability for injury to trainmen caused by fish chutes near main track); *Bryce v. Chicago, M. & St. P. Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 832 (liability of railroad for injury to brakeman by structure near track); *Chicago & A. R. Co. v. Stevens* (Ill.), 20 Am. & Eng. R. Cas., N. S., 182 (liability where coal shed near track collided with brakeman on car ladder); *Potter v. Detroit, G. H. & M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 264 (location of telegraph poles as negligence); *Myers v. Chicago, St. P. M. & O. Ry. Co.* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 749 (master not liable for death of servant from low bridge where there has been no negligence on master's part); *Louisville & N. R. Co. v. Milliken* (Ky.), 14 Am. & Eng. R. Cas., N. S., 742 (master not liable for necessary proximity to track of mail crane located by government); *Barrett v. Great Northern Ry. Co.* (Minn.), 12 Am. & Eng. R. Cas., N. S., 742 (master not negligent in allowing small projecting splinter to remain on rail); *Louisville & N. R. Co. v. Tucker* (Ky.), 23 Am. & Eng. R. Cas., N. S., 876 (negligence in maintaining overhead bridge, action for death of brakeman struck while on top of car); *Wilkie v. Raleigh & C. F. R. Co.* (N. Car.), 19 Am. & Eng. R. Cas., N. S., 295 (roadbed, failure to properly construct and maintain, negligence per se, where trainman injured in derailment); *Kerrigan v. Pennsylvania R. Co.* (Pa.), 16 Am. & Eng. R. Cas., N. S., 835 (roadbed need not be maintained perfectly ballasted for servants); *Louisville & N. R. Co. v. Victory* (Ky.), 12 Am. & Eng. R. Cas., N. S., 538 (sufficiency of evidence to show that master was chargeable with notice of defect in track); *Crandall v. New York, etc., R. Co.* (R. I.), 5 Am. & Eng. R. Cas., N. S., 543 (telegraph pole placed so near track as to involve risk of injury to employee); *Hurst v. Kansas*

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judicial knowledge, that the failure to have a spring at said switch would constitute negligence, and the count does not show in what other respect the switch was defective. (2) It is not alleged what would be a proper appliance to keep the switch in proper condition. (3) The count does not allege that the switch was connected with or used in the business of the defendant." This demurrer was overruled. The defendant pleaded the general issue and several special pleas, among which was the seventh plea, which was in words and figures as follows: "(7) Comes the defendant, by its attorney, and, for answer to the first count of the complaint, says that it is operating its street railroad under and in pursuance of a contract entered into with the mayor and aldermen of Birmingham pursuant to a resolution adopted on the 6th day of July, 1898; that in and by said contract it is stipulated and provided as follows: 'Fifth. All construction or work done, and material and appliances used on any of said lines by said company, shall be done under the supervision and subject to the approval and control of the city engineer, and all cars, tracks, poles and equipments of said company shall be first-class in every respect, and so maintained.' And defendant avers that said switch was approved by the city engineer, and said work was done under the supervision and with the approval of said city engineer; and defendant avers that, after said switch was put in and said work done, that the same was inspected and approved by the city engineer of

City, P. & G. R. Co. (Mo.), 21 Am. & Eng. R. Cas., N. S., 899 (unreasonable period for leaving gravel piles causing injury to brakeman between tracks in station yard); *Morris v. Duluth, etc., Ry. Co.* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 45 (unusual but reasonable size of blocking between guard rail and main rail no evidence of negligence where brakeman was injured by stumbling because of); *Denver & R. G. R. Co. v. Pilgrim* (Colo.), 8 Am. & Eng. R. Cas., N. S., 249 (derailment of train by snow slides); *Hollenbeck v. Missouri Pac. Ry. Co.* (Mo.), 3 Am. & Eng. R. Cas., N. S., 350 (ditch in tract within knowledge of defendant's section foreman); *Wright v. Southern Ry. Co.* (N. Car.), 12 Am. & Eng. R. Cas., N. S., 717 (duty to have safe roadbed cannot be delegated); *Chesapeake & N. R. Co. v. Venable* (Ky.), 21 Am. & Eng. R. Cas., N. S., 450 (duty to inspect roadbed); *Chicago & E. I. R. Co. v. Driscoll* (Ill.), 12 Am. & Eng. R. Cas., N. S., 644 (failure to provide butt post on stub track as negligence); *Baker v. Great Northern Ry. Co.* (Minn.), 21 Am. & Eng. R. Cas., N. S., 396 (injury to servant from defective roadbed, allegation of proximate cause); *Louisville & N. R. Co. v. Ross* (Ky.), 17 Am. & Eng. R. Cas., N. S., 432 (inspection of tracks, care required of master to discover defects in track); *Louisville & N. R. Co. v. Mattingly* (Ky.), 8 Am. & Eng. R. Cas., N. S., 319 (instructions as to liability of company for falling in of tunnel); *Fitzgerald v. New York Cent. & H. R. R. Co.* (N. Y.), 9 Am. & Eng. R. Cas., N. S., 434 (liability for death of employee from overhead bridge); *Chesapeake & N. R. Co. v. Venable* (Ky.), 21 Am. & Eng. R. Cas., N. S., 449 (liability for failure to keep roadbed in repair in action for injury to brakeman); *Whipple v. New York, etc., R. Co.* (R. I.), 5 Am. & Eng. R. Cas., N. S., 517 (obstructions near track, negligence); *Wood v. Louisville & N. R. Co.* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 525 (placing cattle chute near track as negligence).

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Birmingham, and was first-class in every respect, and was so maintained until the alleged injury."

To the seventh plea the plaintiff demurred upon the following grounds: "(1) Because said plea does not aver that the defendant's lines at the point of the switch named in the complaint were in first-class condition in every respect, as required by the ordinance. (2) Because it is not averred in said seventh plea that the city engineer is infallible, and that his approval made the defendant's line and equipments in first-class condition. (3) Because the said plea does not aver when the city engineer approved the defendant's lines and equipments, and that the lines and equipments were in first-class condition at the time of plaintiff's injuries." This demurrer to plea No. 7 was sustained.

On the trial of the case the plaintiff introduced evidence tending to show that in October, 1898, he was in the defendant's employment as a conductor, his run extending over Eighth avenue, in Birmingham, Ala., and covering the point where plaintiff was injured; that on the 23d of October, 1898, while in the discharge of his duties as conductor, plaintiff was thrown from one of defendant's cars and permanently injured; that said car, of which plaintiff was in charge, in passing along said Eighth avenue, "split the switch" (that is in passing the switch named in the complaint, the front trucks kept the main line, and the rear trucks took the side track), which caused a sudden twist of the car, throwing plaintiff violently to the ground, he being on the rear platform, in the discharge of his duties as conductor; that this switch was always kept open to the main line, and it was not necessary to stop there and throw the switch; that in splitting the switch the rear trucks would take the wrong track, and that this might be caused by the tongue's not being thrown properly or standing up a little; that this switch point was usually held in place, or, rather, designed to be held in place, by a spring or a little piece of iron, which one of the witnesses found missing or out of place a time or two; that in passing over this switch the cars generally went over with a kind of jolt; that there was no spring attached to this switch, although there was a place for one; that the little piece of iron used to hold the switch in place was a piece of fish plate, about as wide as two fingers, and on one occasion when there was a derailment at that point one of the witnesses found that the switch point was up on top of the piece of iron; that there was no appliance to keep the switch point in place; that a fish plate was used to keep the switch point in place, but it would sometimes work loose; that several cars split this switch and became derailed before plaintiff was injured, which was brought to the notice of defendant's track foreman. The plaintiff introduced other evidence tending to show that the track was out of gauge (too narrow by one-half or three-quarters of an inch) at the point where plaintiff was hurt;

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that this was known to defendant's servants charged with keeping the track in proper condition, and had been so known for a long time; that in passing over said place the front wheels would mount the point of the switch sometimes; that after the plaintiff got hurt a guard rail was put down at the switch point. Plaintiff introduced evidence as to his injuries, showing that he was permanently disabled and could no longer do manual labor, and that he was then 53 years old, and was making \$1.50 per day at the time he was hurt; that he had suffered mentally and physically; that he expended \$50 in and about his cure; and that he had been unable to secure employment since his injuries.

Defendant introduced testimony tending to show that the track was in proper gauge at the point where plaintiff was injured, and that a spring could not be used at that point; that cars passed there many times a day without being derailed; that the loose-tongue switch, such as the one in question, was in general use by well-regulated railroads; that a spring is not used much in cities, and not when the cars pass through it both ways; that the switch had been fixed three or four months before plaintiff got hurt; and that at the time plaintiff was hurt it was in proper gauge. And the defendant introduced rules of the company regulating the speed of cars, and requiring caution in passing over curves, switches, etc.

During the examination of J. R. Murphy as a witness for the plaintiff, he testified that he was working for the defendant during the summer of 1898 under Baker, who was head foreman of the track hands; that he was present when the switch at which the plaintiff was hurt was put in; that while the switch was being put in he tried the gauge two or three times, and it was not in gauge; that the switch was too close, and lacked about three-quarters of an inch of being in gauge. Witness was then asked the following question: "Was Baker's attention called to that?" To this question defendant objected upon the ground that it called for incompetent, immaterial, and irrelevant evidence. The objection was overruled, and the defendant duly excepted. The witness answered that he told Baker at the time he and the other hands were spiking the rail down. Witness was then asked what was said between him and Baker. The defendant objected to this question upon the ground that it called for immaterial, incompetent, and irrelevant evidence, and duly excepted to the court's overruling the objection. The witness answered: "I just remarked to him that he was spiking the rails up too close, and he said he wanted them close; and I remarked to him that some motorman would come along here and ditch a car and kill somebody, or something of that kind—some remark—and he said, 'I don't give a damn,' and, 'I will be in Chicago or somewhere else at that time.'" The

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court overruled the motion of defendant to exclude the answer of the witness, and to this ruling the defendant duly excepted.

Upon the introduction of all the evidence, the defendant requested the court to give the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they cannot find for the plaintiff on the first count of the complaint." "(3) If the jury believe the evidence, they cannot find for the plaintiff on the sixth count of the complaint."

There were verdict and judgment for the plaintiff, assessing his damages at \$8,000; and defendant made a motion for a new trial upon the grounds that the verdict was contrary to the law and to the evidence, and that the verdict was excessive. This motion was overruled, and the defendant duly excepted.

Alex T. London and John London, for appellant.
Lane & White, for appellee.

McCLELLAN, C. J. We read the first count of the complaint to charge that the want of a spring at the switch, or other appliance to hold the switch rail in position for the safe passage of cars, was a defect in the ways or works of the defendant. It is further explicitly averred that this defect arose from, or had not been remedied owing to, the negligence of the defendant, or some person in its employment "intrusted with the duty of seeing that a spring or other proper appliance was used in connection with said switch, so as to hold the switch point in its proper position." And to the defect thus averred the injury to plaintiff is ascribed. On the case thus presented, it is not for the court to determine, as matter of law, whether the want of such spring or appliance constituted a defect in the track or switch, but that was an issue of fact for the jury. The court properly overruled the demurrer to this count.

The demurrer to the seventh plea was properly sustained, or, at least, if there was technical error in that ruling, it did not prejudice the defendant. Of course, if the switch was defectively constructed, the fact that the city engineer thought otherwise, and approved it as being properly constructed, would be no defense in this case. If the plea is to be taken as averring, in addition to the approval of the engineer, that the switch was a proper one and properly laid, this was matter covered by and redundant upon the general issue, and defendant had the full benefit of it under the plea of not guilty.

It was pertinent to the issues presented by the sixth count to show that the person to whom defendant had intrusted the duty of seeing that its ways were in proper condition knew that the track at the point of the derailment was out of gauge. In proving this it was competent to prove not only that the attention of such person was called to the fact, but also what he said in response to the statement made to him that the

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track was out of gauge, in so far, certainly, as that response evinced a consciousness on his part that he understood the statement, and recognized the existence of the fact stated. Hence it is that at least a part of what Baker said to Murphy when the latter called the former's attention to the defect in the gauging of the track—that part which tended to show that Baker was then conscious that he was having the gauge made too close—was properly received in evidence. The court did not err, therefore, in overruling the motion to exclude what Baker said on that occasion, though it be conceded that what else he said, considered by itself, was impertinent.

It may be that the use of a "loose-tongue" switch on electric street railways, without a spring or other appliance to hold it in a desired position, is common and usual with well-regulated roads of that class, and that ordinarily the use of such a switch without such a spring or other appliance in the track of such roads does not constitute a defect in the condition of such track; but when a loose-tongue switch is so put into a track, or is put in at such place and for such use, that it is likely to cause derailment of cars attempting to pass, unless it is provided with a spring or other proper appliance to hold the tongue out of the way of wheels not intended to take the switch, and no spring is attached and no appliance is provided, or, if an appliance is provided, it is not adapted to and does not accomplish the purpose for which it is provided, the presence, structure, and use of such a switch without a spring or other proper appliance does constitute a defect in the ways of the company. The switch here, it appears, was not one leading from one line onto another, or from a main line onto a branch road, but one going onto a mere siding. The degree to which or the frequency with which this siding was used does not appear; but it is clearly inferable from the evidence that cars were usually run by this place without going onto the siding at all, that the switch was supposed to be in a position to admit of this without manipulation by motormen as they approached it, and that a small piece of iron was provided there, to be used in keeping the point of the switch rail so far away from the adjacent rail of the main track as that passage along the latter would not be interfered with by the switch rail or tongue. There was also evidence tending to show that this piece of iron was ineffective to so hold the switch tongue, that it frequently got out of place, and that when out of place the tongue was liable to, and frequently did, get over against the main rail, so that wheels of a passing car would sheer off the main rail onto it when it was not intended or expected that they should or would. Indeed, the evidence tends to show that when the small piece of iron was out of place the switch tongue would be jarred by the forward trucks or wheels of a car in passing on the main line over against the main-line rail, so as to catch the wheels

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of the after truck, and force them onto the switch rail while the forward trucks continued on the main rail, thus causing the car to "split the switch," as the witnesses express it, and necessarily produced derailment. This happened in a number of instances both before and after the occasion of plaintiff's injury, and this precise thing happened on the occasion of his injury, and caused that injury. On these tendencies of the evidence, it was for the jury to say whether that switch, as incorporated in defendant's ways at that place for the uses to which it was there put, without a spring or other appliance, or without proper and effective appliance to hold its tongue rail out of the way of the wheels of cars not intended to take it, was or was not a defect in the condition of defendant's track at that point; and, if they so found, it was for them to say further whether this defect was the proximate cause of plaintiff's injuries. Hence our conclusion that the general charge requested by defendant on the first count of the complaint was correctly refused.

There was also evidence in support of the sixth count of the complaint—evidence going to show that defendant's track at the point of the derailment of the car and the injury to plaintiff was out of gauge, and that this defect was the proximate cause of the injury. Upon these issues, too, the court properly declined to give the affirmative charge requested by the defendant.

We do not find that the circuit court erred in overruling defendant's motion for a new trial. The verdict was sufficiently supported by the evidence to justify the conclusion of the court against setting it aside on the insistence of the defendant that the finding was contrary to the evidence, etc.; and, in view of the averments and evidence of plaintiff's pain and suffering, the permanency, to a degree, of his injuries, etc., we cannot see our way to affirming that the circuit court erred in refusing to set the verdict aside on the ground of its alleged excessiveness.

Affirmed.

HURT v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Oct. 23, 1903.)

[76 S. W. Rep. 502.]

Appeal—Review—New Trial.

Rulings on motions for new trial will not be disturbed unless it appear that the discretion of the court has been abused.

Duty to Set Aside Verdict.

Where the trial judge is convinced that the verdict has been returned either under a misunderstanding on the part of the jury, or because of prejudice or other undue influence, it is his duty to set it aside.

Injury to Employee—Defective Brake—Question of Speed Immaterial.

Plaintiff mounted a moving car and attempted to set the brake, when "something slipped or gave way," and he fell in front of the

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car. There was evidence in an action for the injury that he was using a brake stick, contrary to the rules of the company: *held*, that it was proper not to submit to the jury the question of negligence in delivering the car at a dangerous rate of speed, since, if the brake was in proper condition, the speed could not have caused the injury, and, if defective, the speed was immaterial.

Same—Same—Scintilla of Evidence—Question for Jury.

A brakeman was giving a brake wheel a hard turn, when "something gave way," and he fell and was injured; and it was his theory that the brake chain was too long, so that it lapped on itself, and, when he put the force on, the chain slipped. There was no evidence that the brake was defective, but one witness testified he examined a car which had been pointed out by "some railroad employees" on the following day, and that one of the links of the brake chain was pressed together: *held*, that there was a scintilla of evidence, requiring the case to go to the jury.

Same—Liability—Sufficiency of Evidence.

A verdict is not to be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence.

Same—Same—Same.

In a servant's personal injury action, where the circumstances show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Calvin I. Hurt against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Bennett H. Young and Edwin C. Waide, for appellant.
Helm, Bruce & Helm, for appellee.

O'REAR, J. Appellant was a member of a switching crew in appellee's yard at Louisville. A flat car loaded with railroad rails was "kicked" or turned loose, with a strong shove from the locomotive, down a track that crossed a public street. It was appellant's duty to mount this car as it passed him, and to set the brake so as to stop it within a reasonable distance. In setting the brake, appellant fell or was thrown from the car, falling in front of it, and lost two of his limbs, and was otherwise hurt. This suit charged that the injury was because of the gross negligence of appellee's agents in charge of the locomotive in delivering the car at a too rapid rate, and in the failure of appellee to provide the car with a safe brake. The car was turned loose, when going, appellant testified, at 8 or 10 miles an hour. Witness for appellee said at 2 to 6 miles an hour. Others thought it was more than 10 miles an hour, while some expert witnesses, who were not present at the time of injury, thought, from the distance the car traveled before stopping, that it was from 12 to 20 miles an hour. Appellant made two efforts to set the brake. The first time he thought it was set tight enough, but, finding it was not, and probably because of a command of some one to stop the car, he attempted to set it tighter. He says that, as

he swayed his body forward and outward to give the brake wheel the necessary turn, "something slipped or gave way," and he fell in front of the moving car. He did not know what it was that slipped or gave way. He had not previously examined the brake or the car, nor had opportunity to, so far as was shown, and did not afterward examine it. The brake was an upright iron rod, extending about three feet above the platform of the car, and surmounted with an iron wheel used in turning it. It extended below the platform. A chain was attached to the lower end, and connected with a horizontal rod attached to the brake beam. As the brake wheel was turned the chain was wound around the upright rod, thereby shortening the chain and drawing the brakes against the wheels. Appellant said that he thought—and that is his theory of the cause of the accident—that this chain was too long, and lapped upon itself, partially, in the setting up of the brake, and, when he put the extra force on the wheel to set it tighter, the chain slipped off the lap, whereby he was given an unexpected lurch forward and was thrown, as stated. If the chain was so long as to permit it to overlap, or "ride" itself, it is claimed that it was an unsafe provision, and that allowing it to be so was negligence on the part of the company. A number of persons inspected the car and the brake immediately after the accident—within a few minutes—and while it was in the same condition as it was when the injury occurred. They all testified that the chain was not too long, and was in perfect order. The brake was set up, and worked properly. There were three trials of the case. At the first trial the jury disagreed. Upon the second trial the jury returned a verdict for appellant in the sum of \$10,000. A motion was made by the company for a new trial, based upon numerous grounds—among others, that the verdict was flagrantly against the weight of the evidence, and that the verdict was excessive. The court granted a new trial, but upon which of the grounds, the record does not show. Upon the third trial, upon substantially the same evidence and under practically the same instructions, the jury found for the defendant (appellee). Appellant's motion for a new trial was overruled. This appeal seeks to reverse the action of the trial court in setting aside the verdict for \$10,000 and granting a new trial of the action, and to have this court order a reinstatement of the judgment upon that verdict, or, if that is not done, then that the judgment in this case upon the verdict rendered at the last trial be set aside because the court failed to properly instruct the jury at appellant's instance.

We will first review the action of the trial court in setting aside the verdict in appellant's behalf. Appellee insisted that there was no evidence to have authorized the submission of the case to the jury at all, and that its motion for a peremptory instruction should have been sustained. The trial court, however, did not set aside the verdict on this ground,

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manifestly, because, upon the next trial, when the evidence was not materially different, he again refused to grant a peremptory instruction, and submitted the case to the jury. Nor was the action of the court probably based upon the complaint of the company that the court had misinstructed the jury, for upon the next trial he gave about the same instructions as before. His action, then, must have been based upon the ground either that the verdict was not sustained by, but was contrary to, the evidence, or that the amount of damages was excessive.

Trial courts have, and ought to have, a very liberal discretion accorded to them in the matter of passing upon grounds for a new trial; and in this, as in other matters of discretion, their judgments therein should not be disturbed, except it should appear that its exercise has been abused. The judge who presides at the trial has an opportunity, that this court cannot have, of seeing the manner in which the witnesses testify, of observing the attention and conduct of the jury, and the demeanor of the parties and counsel, and of many other circumstances which might affect the verdict. He has also an opportunity, and it is his duty, to note the evidence submitted to the jury, and, while it is the province of the jury to decide the questions of fact involved in the issue being tried, yet they should not be allowed to disregard it. Where the trial judge is convinced that the evidence does not warrant the jury's verdict, and that the verdict has been returned either under a misunderstanding upon the part of the jury, or because of their prejudice, or other undue influence, it is certainly within the province of the court, as well as his duty, to set it aside. In *Reliance Textile & Dye Works v. Mitchell*, 71 S. W. 425, we held: "This court is less inclined to disturb the action of the circuit judge in granting a new trial than in refusing one, for the reason that the new trial simply gives the parties another hearing, without finally settling their rights. * * * The law has wisely vested in the circuit judge a judicial discretion on this subject." Also, see, *Taylor, Jr., v. Louisville Public Warehouse Co. (Ky.)* 72 S. W. 20. The circuit judge, under the evidence in this case, was acting clearly within his supervisory discretion in setting aside the verdict upon the ground that it was against the weight of the evidence, and flagrantly so.

The principal criticism of the last trial is that the trial court failed to submit to the jury an element of appellee's negligence that was charged in the petition, and claimed to be justified by the evidence. The circuit court told the jury, in substance, that it was the duty of the railroad company to provide safe appliances upon the car, and that if it failed to do so, in that the brake was defective, and that it knew, or by the exercise of ordinary care might have known, of the defect in time to have remedied it before the accident, and

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that the injury was caused by such defect, without negligence upon the part of the plaintiff, then the jury should find for the plaintiff. The complaint is that the court failed to submit to the jury also the fact of whether the defendant was not negligent in delivering or sending the car to plaintiff at a reckless and dangerous rate of speed. The court declined to instruct upon this theory, because, as said in his opinion on that point, the evidence showed conclusively that appellant was not injured by the rate of speed, for he mounted the car in safety, whether it was running too fast or not. The argument for appellant at this point is that the momentum of the car, being too rapid, necessitated more force to be put upon the brake to stop it; that, at a moderate and proper speed, it could have been stopped by appellant's first effort in setting the brake; and that therefore his injury was caused by the high speed of the car. While not without some plausibility, we cannot agree that this position is sound. The rate of speed of the car was not the proximate cause of the injury, according to appellant's testimony, but it was something about the brake that slipped. If the brake had been in proper condition, the rate of speed of the car could not have caused the injury. On the other hand, if the brake was defective, as charged, it is not material at what speed the car was moving—whether two miles an hour or twenty miles—because, if appellant was injured by that defect, the company is liable. To have submitted to the jury the question of appellee's negligence upon the question of the speed of the car would have been misleading. It might have been that the car was turned loose at a point in the city where its rate of speed was negligent to those using the street, or to one required to make a coupling of the car; but, to the brakeman who was safely upon it, there is nothing in the evidence to show that it was at all negligent. If the brake had worked properly, and there was no other cause for the accident, appellant could not have been thrown from the car merely by the rate of its speed, nor does he claim that he was. There was evidence tending to show that appellant was using a brake stick, in violation of the rules of the company, the danger of which was well known to him. This is what might have slipped. Appellant may in some way, unaccountable even to himself, have lost his balance and fallen. At any rate, there is nothing to show that the rate of speed was the direct or proximate cause of his injury. It was therefore proper not to have submitted that question to the jury.

The plaintiff's theory of the cause of the accident, so far as the condition of the brake is concerned, is only a theory. He does not profess to know personally what was the cause. No witness testifying for him said that the brake was in any wise defective, or that it was possible for the chain to have overlapped as surmised in the theory for appellant. The

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witness Bashaw, who testified for plaintiff that he had examined a car which had been pointed out by "some railroad employees" on the following day, and that one of the links of the brake chain was pressed together, does not really identify the car, nor the relation to appellee of the person who pointed it out to him. But even if this witness' identification of the car had been satisfactory, the evidence was simply overwhelming that he was mistaken—that the chain was not defective, as stated. However, this constituted what might be called a scintilla of evidence, requiring a submission of the question to the jury. Appellee's motion for a peremptory instruction was properly overruled. But it does not follow by any means that the rule requiring the submission of a case to the jury if there is a scintilla of evidence means that a verdict may be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence. Before the injured servant can recover damages from his master, he must show that his injury was caused by some neglect of the master, or by some other servant of the master, which is imputed to him. It is not enough to show merely that the plaintiff sustained his injury while in the service of the master. Where the circumstances attending the injury show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof. The cause of the injury must be proved. Unless it is shown affirmatively, there can be no recovery. *Hughes v. Cincinnati, etc., Ry. Co.*, 91 Ky. 526, 16 S. W. 275; *Louisville Gas Co. v. Kaufman, Straus & Co.*, 105 Ky. 131, 48 S. W. 434; *L. & N. R. Co. v. Wathen* (Ky.) 49 S. W. 185; *Illinois Central R. Co. v. Gholson* (Ky.) 66 S. W. 1018.

The judgment of the circuit court must be affirmed.

GULF & S. I. Ry. Co. v. BUSSY *et al.*

(*Supreme Court of Mississippi, Oct. 26, 1903.*)

[35 So. Rep. 166.]

Limiting Fellow-Servant Rule—Application of Constitutional Provision.

Const. § 193, limiting the application of the fellow-servant rule in the case of railroad employees, has no application to an action founded on the negligence of the master itself, in not providing a safe way.

Injury to Employee—Contributory Negligence.

Evidence in an action by the representatives of a railroad brakeman killed in the derailment of a train *held* not to show contributory negligence overthrowing a verdict for plaintiff.

Appeal from Circuit Court, Hinds County; Robt. Powell, Judge.

"To be officially reported."

Action by C. M. Bussy and others against the Gulf & Ship

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Island Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action for damages by the next of kin of Thomas B. Bussy, who was killed by being run over by the freight train on which he was front brakeman. The declaration alleged that while the train was in motion, and when the deceased, in the orderly discharge of his duties, walked out on the running board of the locomotive, a car of the train was derailed, causing a sudden and violent stop and forward jerk of the train, in consequence of which deceased was thrown off the train and run over and killed; that such derailment was caused by a loose and sunken joint between two rails, which defendant negligently suffered to be out of repair. Defendant pleaded the general issue, and in a second plea the contributory negligence of deceased in going out on the running board of the locomotive, and thence to the pilot, while the train was in motion, and in a third plea the contributory negligence of the deceased in recklessly placing himself on the track in front of the train while it was in motion. The evidence for the plaintiff shows that deceased was head brakeman on the freight train of the Laurel Branch of the Gulf & Ship Island Railway, which intersects the main line at Saratoga Station. That trains on this branch road usually come into Saratoga, and switch off onto a side track to stop. The branch line runs east and west, and 500 feet east of the switch on the branch line there is a trestle 154 feet long and 8 feet deep, and still further east another trestle, 184 feet long. That trains coming into the switch sometimes stop for the switch to be thrown, and sometimes just slow up, and the head brakeman would get off and run ahead of the train, and throw the switch before the train got to it. That on the 18th day of March, 1901, the train on which deceased was brakeman came into Saratoga Station, and was running about 3 or 4 miles an hour when it reached the easternmost trestle. That at the eastern end of this trestle, there was a low joint in the road, and at this point the trucks of one of the freight cars near the hind end of the train was derailed, and the wheels ran along on the cross-ties for about 60 feet, when they were thrown crossways the track, and the train stopped. That deceased was found near the western end of the western trestle, having been run over and mutilated by the engine and several freight cars. That the distance from where the body was found to the switch was 474 feet, and that the body was found where the engine would be on the track when the derailment occurred. That it was deceased's duty to get off the train and throw this switch, and that, the last seen of him, he was going forward to perform this duty. The evidence does not disclose positively how deceased came to his death. The evidence for defendant was to the effect that there was no low or defective joint, as testified to by plaintiff's witness, but there was a

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fish bar under the joint, and that it had not been repaired, and trains had constantly passed over the place for a long time since the accident in perfect safety. The engineer testified that Bussy was rather reckless, and that he had remonstrated with him about getting on the pilot of the engine; that he last saw deceased going out of the fireman's window, towards the front of the engine; that some one gave a signal that the switch was open, and he went right on in, and the switch had been opened by Bussy or some one else. So that, if Bussy did open the switch, the point at which his body was found shows that he came back towards the moving train.

E. J. Bowers and McWillie & Thompson, for appellant.

Alexander & Alexander, for appellees.

WHITFIELD, C. J. This action is founded upon the negligence of the master itself, in not providing a safe way, and was hence manifestly maintainable, without reference to section 193 of the Constitution. *White v. Railroad Co.*, 72 Miss. page 12, 16 South. 248. That section is therefore not involved in this case. The only point worthy of serious consideration is whether the plaintiff was guilty of contributory negligence. The theory that Bussy got down off the pilot on the trestle, went forward, threw the switch, and returned towards the engine on the trestle—the engine moving all the while at about four miles an hour—and was killed in trying to jump on the pilot, is utterly untenable. It was, in view of the distance from the point where he would have so gotten off, to the switch, a physical impossibility that the injury could have occurred in that way, as a simple mathematical calculation will demonstrate. The theory that the derailment was caused by a brake shoe falling on the rail has the testimony of but one witness, and that of the most shadowy kind, to rest on. The presence of the brake shoe may very easily be accounted for by the fact of the wrenching around under the cars of the trucks. The testimony makes no such case. The theory of the plaintiff is that the derailment of the cars caused a sudden, violent jerk, which threw the plaintiff, and caused him to fall from the front of the engine to the trestle, and that he was then run over and crushed by a number of cars before the train came to a stop. That he was run over and crushed is shown by the manner in which his body was mutilated. That it was a sudden and violent jerk or jar of the train which projected him forward on the middle of the trestle has been found by the jury to be the most reasonable and probable cause of his death. The jury evidently found it more reasonable than the opposite theory, that he would attempt to get off the train moving about four miles an hour, on a trestle. There was no occasion to do so. It was perfectly easy for him to have waited until the train got on solid ground, and then have gotten off, gone forward, and thrown the switch. None of the theories presented by the defendant commended themselves to the jury

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as at all probable or reasonable. They evidently discredited both the statement that any derailment signal was given, and the other most remarkable statement by one of the crew that he felt no jar from the derailment. When one considers the nature of the mutilation of the body, the fact that trucks were wrenched around at right angles under the derailed car, that one of the new cross-ties was actually broken by the violence of the movements of the train, the distance run by the cars on the cross-ties of the trestle after the derailment, and the further fact that the train was moving at about 4 miles an hour—a heavy freight train, with 16 cars—the statement by one of the crew that he, under these circumstances, felt no jar at all, was naturally discredited by the jury. What we regard as very strongly convincing evidence, quite sufficient to warrant the correctness of the jury's conclusion, is the admitted fact—a fact testified to by defendant's witnesses—that the body of Bussy was found at the point where the engine would have been when the derailment occurred. This is a most pregnant fact, from which the jury may very reasonably have inferred that, at the very instant of the derailment, Bussy was thrown by the jar from the front of the engine to the middle of the trestle, and there run over and killed. It is shown by the testimony, so far as contributory negligence is concerned, that it is not unsafe to be on the running board leading round to the front of the engine. It was customary for employees to go around on that running board, holding by the hand hold, and light the headlight, while the train was in motion. We think the conductor meant by the language that he would not have told Bussy more than twice to go, before he would have "fired" him, that it was Bussy's duty, and, if he had to tell him more than twice to do his duty, he would have discharged him. That seems the plain meaning, from the context. What the jury evidently believed was that Bussy went around to the front of the engine, and was waiting there for the train to get on solid ground, with no purpose at all of getting off on the trestle, and this is as reasonable an inference as can be drawn from the testimony—we think the most reasonable one. If the evidence had shown that Bussy was thrown off or fell off whilst trying to descend from the front of the engine to the trestle, he was clearly guilty of contributory negligence of the most flagrant kind, the train moving at about four miles an hour. But when the distance from the end of the trestle to the switch is considered, and the fact that Bussy had the most abundant time in which to have gotten off on the ground and have thrown the switch, there is no rational ground upon which to base the conjecture that he entertained the foolhardy purpose of attempting to descend from that moving train to the trestle.

We have given every phase of the case painstaking consideration, and are not able to say that the verdict is manifestly wrong. Affirmed.

KECK v. PHILADELPHIA & R. R. Co.*(Supreme Court of Pennsylvania, July 9, 1903.)*

[56 Atl. Rep. 47.]

Injuries to Employees of Another Company—Liability—Employers' Liability Act.

A railroad company, independently of Act April 4, 1868 (P. L. 58), relating to injuries to railroad employees, is liable to the employees of another railroad company for negligence in the same manner as to other strangers; and the effect of such act was to divide all persons into three classes—employees, quasi employees, and strangers.

Joint Use of Track—Employers' Liability Act.

Under Act April 4, 1868 (P. L. 58), where two railroad companies used the same track, it must be considered as the property of each while using it; and it is immaterial whether such use be by virtue of joint ownership, license, or traffic agreement.

Working on Track of Another Company—Assumption of Risk.*

Where a railroad employee is working on a train on the track of another road, he accepts the risk of his employment in regard to his own road, but not those risks incident to the operation of the other road, unless engaged at the time in work for such road, or for both roads jointly.

Same—Application of Employers' Liability Act.

A locomotive engineer who is running a train over the tracks of another company under permission given to his employer to use such road, and is injured by the negligence of the employees of the other company, is not within Act April 4, 1868 (P. L. 58), providing that any person who sustains injury while engaged in railroad work about any train of a company of which he is not an employee shall have the same right of action as if he were an employee.

Appeal from Court of Common Pleas; Philadelphia County.

Action by Eliza A. Keck against the Philadelphia & Reading Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff's husband was employed as a locomotive engineer by the Central Railroad Company of New Jersey. By permission of the Philadelphia & Reading Railway Company, the Central Railroad Company, at the place where the accident occurred, drew its trains over the tracks of the Reading Company, and in so doing used its own engine and crew. The tracks consisted of two tracks, with turnouts and switches. On one of the tracks at the time of the accident were two trains belonging to the Reading Company, both headed in the same direction, one moving and the other standing still. The Central Company train was moving on the adjoining track. Just as the moving Central train reached the end of the standing Reading train, the second train of the Reading Company came along the track occupied by its standing train, and a tail end collision occurred, by which the caboose of the standing train was thrown upon the engine

*See note appended to *Story v. Concord & M. R. R.* (N. H.), 20 Am. & Eng. R. Cas., N. S., 90.

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of the Central train, and the engineer, plaintiff's husband, was killed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Gavin W. Hart, for appellant.

A. T. Freedley and U. S. Koons, for appellee.

MITCHELL, J. When the same tracks are used by two railroad companies, how far does the operation of the act of April 4, 1868 (P. L. 58), in relief of each from liability to the employees of the other, depend on the ownership or title to the tracks? This question, though more or less involved in some of the cases under the act, has not been directly determined with reference to a general rule on the subject, unless in the recent case of *Kelly v. Union Traction Co.*, 199 Pa. 322, 49 Atl. 70, which will be considered further on. Independently of the statute, each company was liable to the employees of the other for negligence, just as to any other strangers; the general similarity and aim of the duties not being sufficient to bring them within the rule as to risks of a common employment. *Catawissa R. Co. v. Armstrong*, 49 Pa. 186. The general effect of the act was, as has been said, to make three classes of persons—employees, quasi employees under the act, and strangers. It was held in *Spisak v. B. & O. R. Co.*, 152 Pa. 281, 25 Atl. 497, that the cases under the act fall into two classes—first, where the place of the accident “is clearly and for general purposes the ‘roads, works, depots or premises’ of the railroad company. In such cases it is sufficient if the person injured is lawfully ‘engaged or employed on or about’ them, and is not a passenger. * * * The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company. In this class the nature of the employment at which the party injured was engaged at the time becomes material. If it is business connected with the railroad, in the sense that it is ordinarily the duty of railroad employees, then, while the party is engaged at it, the statute treats him as a quasi employee, and puts his rights on the same basis. If, however, the work has no relation to railroad work, as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all.” This distinction has been constantly adhered to since, and, under it, when an accident occurs upon a track used by different roads, the question at once arises, whose track is it to be considered, for the purposes of the act of 1868?

The cases establish that the nature and extent of the ownership of the tracks is not a controlling factor. The case which comes nearest to a direct decision on the point involved in the present controversy is *Kelly v. Union Traction Co.*, 199 Pa. 322, 49 Atl. 70, already mentioned. Two pas-

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senger railway companies ran their cars east and west on the same tracks on Arch street in the city of Philadelphia, and, by arrangement between themselves, used the south track going east, and the north track going west, connecting them by two switches at the eastern terminus. The duty of the car first arriving at the terminus was to run east of the east switch, while the car following it stopped between the two switches. The motorman of the first or eastern car was then to reverse his trolley, turn the east switch, and cross over to the north track for his western trip. On the occasion of the accident he neglected to turn the switch, and ran his car west on the east-bound track till it struck the car that had followed it east, and injured the plaintiff, who was the conductor in the employ of the other company. It was held that the case was not within the act of 1868, and the plaintiff could recover. It is settled, said the court, "that the road on or about which the accident occurs need not be owned by the defendant company, to bring it within the terms of the act of 1868, but the use, by agreement, of the road of another company by the defendant company, makes it the latter's road, in contemplation of the act. * * * The track at the point of the accident was in the use of the Hestonville Company, and therefore had, by agreement of the parties, become for the time being the road of that company. Its employees, in the operation of its cars, had a right to be there, and they could enforce their right to protection against the negligence of every one save the co-employees of that company." It does not appear in the report, but was a fact in the case, that both companies had a charter right to use Arch street; and the use of the same tracks, while by agreement between them, was not really a lease or license from the first, which laid the tracks, but an adjustment of equal rights so as to avoid a conflict. This fact, it is very forcibly argued by the appellants, distinguishes the case from the present, and puts the plaintiff in the class of permissive users of the railroad's premises, such as in *Ricard v. North Penna. R. Co.*, 89 Pa. 193; *B. & O. R. Co. v. Colvin*, 118 Pa. 230, 12 Atl. 337; *Miller v. Cornwall R. R. Co.*, 154 Pa. 473, 26 Atl. 779; and similar cases. The decisions, however, show that this difference has not been considered material. In *Mulherrin v. Delaware, etc., R. Co.*, 81 Pa. 366, the plaintiff was an employee of the company owning the tracks, and the action was against the licensee. It was held that the latter's title was not material, and the case was within the act. The plaintiff, said Paxson, J., "was not an employee of the defendants, but he was employed on or about their road. The fact that the defendants were only entitled to track rights to the road is not material. This is not a question of the extent of their title. It was the road of the defendants for the purpose of moving their trains, which is sufficient to bring the case within the act of 1868." So, in *Weaver v. Phila., etc., Ry. Co.*, 202 Pa. 620, 52 Atl. 30, the siding was

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on the land of plaintiff's employer, and the cars, etc., were the property of the defendant, though used on the land. "What matters it," said Mr. Justice Dean, "whether this was by reason of an ownership of the land, a formal written license, or by a parol permission of the iron company? For all the purposes of a common carrier, the premises were the premises of the railroad company in shipping in and out the iron company's freight."

The rules to be deduced from the cases, as substantially determined in *Kelly v. Traction Co.*, are: First. Where the same track is used by two railroad companies, it must be considered, for the application of the act of 1868, as the property of each while using it. Secondly. Whether the use be by virtue of joint or several ownership, charter right, lease, license, or traffic agreement, is immaterial. Thirdly. To bring the case within the second class, distinguished in *Spisak v. B. & O. R. Co.*, 152 Pa. 281, 25 Atl. 497, namely, those where the employment is ordinarily the duty of railroad employees, the plaintiff must not only be engaged in such work, but also be so engaged for or upon the property of the railroad by whose negligence he is injured. Thus in the present case the plaintiff's husband was engaged in railroad work as a locomotive engineer, but not for the defendant, nor upon premises which were to be treated as defendant's at that time. He was therefore not within the act. Fourthly. In such cases the employees of each road accept the risks of their employment in regard to their own road, but not those incident to the operation of the other road, unless at the time engaged in some work for the other, or for both roads jointly.

The distinctions thus made were not directly developed by the facts in the earlier cases, but, as already shown, the language of the opinions indicates the trend of thought on the subject, and no case has been decided which upon its facts is out of harmony with the rules now laid down. Even *Mulherrin v. Del. & R. R. Co.*, 81 Pa. 366, where the facts are not very clearly stated with reference to this point, which was not raised, when carefully examined, shows that it is in accord. Plaintiff got off his train to open a switch in the performance of his duty, and his train passed on. He waited until it returned on another track, and then walked down the first track on his way to rejoin his train, and while so walking was struck by the train of the other company. The track on which he walked was the property of his road, and, if he had been injured by the other train while in the performance of his duty on it, he would have had his action. But at the time of the accident his train had passed off that track, which had become temporarily the property of the other company, the defendant, by the entry of its train. Plaintiff therefore was walking on defendant's track, and was rightfully held guilty of contributory negligence, as well as having his case come within the act of 1868.

Judgment affirmed.

MARSH *v.* LEHIGH VALLEY R. CO.*(Supreme Court of Pennsylvania, July 9, 1903.)*

[56 Atl. Rep. 52.]

Death of Employee—Explosion of Boiler—Negligence Question for Jury.

In an action against a railroad company to recover for the death of a locomotive fireman, caused by the explosion of the boiler of a locomotive, evidence *held* sufficient to take to the jury the question of defendant's negligence.

Fellow Servants—Fireman and Boiler Inspector.*

A locomotive fireman is not a fellow servant of a boiler inspector.

Appeal from Court of Common Pleas, Luzerne County;
Lynch, Judge.

Action by Kate L. Marsh against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN,
and MESTREZAT, JJ.

James L. Morris, Stanley Woodward, and Darling & Woodward, for appellant.

W. H. Hines and D. C. Harrower, for appellee.

BROWN, J. The first reason urged why this judgment should be reversed is that "the direct cause of the accident, the specific negligence of the defendant that is alleged to have caused it," was not shown on the trial below. In presenting this reason the learned counsel for the appellant insist that the case of plaintiff, as presented, is simply one of a supposed theory as to the cause of the accident, and is not supported by established facts. It is, of course, true that, as between employer and employee, the mere happening of an accident raises no presumption that it was due to the negligence of the employer; and no theory as to how it might have happened, not supported by facts from which the jury can fairly find that the specific act of negligence charged is sustained, will justify the submission of the question to them. While the employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary usage of the business engaged in, are safe and suitable, and of keeping

*As to whether inspectors of appliances, etc., and other railway employees are fellow servants, see *McDonald v. Michigan Cent. R. Co.* (Mich.), 7 R. R. R. 288, 30 Am. & Eng. R. Cas., N. S., 288 (not fellow servant of conductor); note, 22 Am. & Eng. R. Cas., N. S., 847 (different department limitation of fellow-servant rule); *Eaton v. New York C. & H. R. R. Co.* (N. Y.), 18 Am. & Eng. R. Cas., N. S., 391; *Fulton v. Bullard* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 547 (not fellow servant of brakeman); *Illinois Cent. R. Co. v. Hilliard* (Ky.), 5 Am. & Eng. R. Cas., N. S., 539 (not fellow servant of conductor); *Canon v. Chicago, M. & St. P. Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 12 (not fellow servant of trainmen, under Iowa statute).

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them in such condition, a verdict and judgment cannot be entered against him at the suit of an injured servant on a guess that he was negligent, or on a mere theory of specific negligence, without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to a jury, who, in no case or controversy, are to be guessers, but, in all, sworn triers of facts, upon evidence submitted to them. This we have repeatedly said in cases like the present, among the latest being *Higgins v. Fanning & Co.*, 195 Pa. 599, 46 Atl. 102; *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792; *Alexander v. Penna. Water Co.*, 201 Pa. 252, 50 Atl. 991; *Price v. Lehigh Valley R. R. Co.*, 202 Pa. 176, 51 Atl. 756; and the judgment here cannot be sustained if it is on a finding of a mere theory, unsupported by proof, that the railroad company was negligent.

The specific act of negligence charged against the appellant is that it knowingly supplied a locomotive with an old, worn, defective, unsafe, and dangerous boiler, which exploded, and caused the death of appellee's husband. On the day of the trial—February 19, 1903—two expert witnesses, called by the plaintiff, had examined the exploded portions. Complaint now seems to be made by the appellant of the examination of the pieces of the boiler by these witnesses, because it was not made until nearly two years after the explosion; but the fact is overlooked that on February 16, 1903, an order was made for a view of the exploded parts by the jury on application of the defendant, based on an affidavit of counsel that "the exploded portions of the boiler of said engine are now in the same condition in which they were when found immediately after the explosion, and that for a proper understanding of the testimony and trial of the case the jury should view and examine the exploded portions of said boiler." In addition to this, on the trial E. T. James, a witness called by the defendant, testified that the parts had been cut as carefully as possible, and that both sheets and crown from the boiler had been varnished and put away, that they might be kept as nearly as possible in the condition in which they were found. As a result of their inspection of the pieces of the exploded boiler, these two witnesses called by the plaintiff testified that the iron was of poor condition, thin and worn, unsafe, rotted, wasted away, and corroded; that it had wasted away from its original thickness of three-eighths of an inch to one-eighth of an inch, and was not thicker than a knife blade; and one of them stated that, in his judgment, the explosion was caused by this unsafe condition of the boiler. In the testimony of John Hart the following is found: "Q. Tell the jury what you saw there when you made this examination. A. Well, I found the boiler in some places to be hard and crystallized metal, and in other places very thin. Towards the front sheet—that

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would be the tube-sheet end—there, very thin on both sides; and from there up to about four feet, I think, one side—about four feet—very thin, runs down to a thickness of a knife blade on the edge; been corroded and wasted around the rivets through the mud ring, making it very weak there on both sides. Q. What else did you see? A. Well, I see that some of the metal seemed to be very good. It stands two or three times, and don't make no fracture; while the others look to me as though it would not stand anything, unfit to have on the road. * * * Q. Did you make a very careful examination of this boiler? A. I went over it twice. I did not overlook that I know of. I looked it over carefully, and done the best I could do with it. * * * Q. Looking at these photographs, and the evidence being that the explosion caused this boiler to be lifted up and thrown over a track into the river, and the engineer and the fireman and brakeman lifted up and flung a distance of several cars from the engine, taking that, in connection with your examination of this boiler, what, in your judgment—in your judgment, now—was the cause of that accident? A. I answered that question before. I thought the boiler was not safe; ruptured right around, and in that manner. Q. When you said the boiler was not safe, where, if anywhere, was the weakness shown in that boiler? A. Shown right from the mud ring up. Q. How were the bolts? A. The bolts looked as if they had been pulled out of some of the holes for a distance up, and I could not tell anything about the rest, because they had been chipped off. Could not say anything about the rupture from there up. Been chipped off, diamond-pointed. Q. How were these back heads held together? A. Held together in the boiler leg with stay bolts, outer to the inner sheet. Q. Stay bolts? A. Yes, sir. Q. In speaking of this rupture, where you say those stay bolts were cut off and this rupture, you say the upper portion of it being stronger than down at the lower portion where you say it was as thin as a knife blade and split all the way up? A. Yes. * * * Q. The Court: What is the usual thickness of boiler iron in locomotive boilers of this character? A. Well, they make them from three-eighths up. I notice that this metal is three-eighths inches boiler now—the crown sheet. The tube sheet is half-inch metal; that is, the back head is half-inch metal. Q. Plaintiff's Counsel: How thick is it at this point where the tear commences? A. Where it starts, just about as thick as a knife blade on every edge." On cross-examination the witness testified: "Q. You say the explosion of this boiler was caused by its being in an unsafe condition? A. Yes, sir. Q. You do not say what that unsafe condition was due to, do you? A. Sir? Q. You do not say to what that unsafe condition was due at the time of the explosion? A. Very weak, and was not able to withstand the pressure necessary to do your work, I presume. Q. But you do not

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say why it was weak? A. I think it has been wasted away. Q. Did you examine the crown sheet for signs of low water? A. Yes, sir. * * * Q. You say the boiler was unsafe? A. In my opinion. Q. Because it did explode? A. Yes, did explode. My opinion, I say it was unsafe, rotted, wasted away, corroded away there." Lyman H. Carle testified: "Q. Tell what you saw when you examined that boiler—its condition. A. There was only a portion of the boiler there. The front or cylinder part of the boiler was not there. The fire box and crown sheet and wagon top and mud ring, all those were there. The rest were not there, as I saw. The boiler, on the top part, looked to be good—the iron looked to be good, and its usual thickness. On the bottom it was in very bad condition, very thin, as though it had been worn away with sediment, bad water, and so on, from usage. * * * The Court: Describe what you saw there. A. The iron, as I saw it, in my opinion, from the top—on the top of the iron is good. Evidently it was, because in one place it is bent over like this, and no fracture in it at all. Then as you go down from that to the mud ring it gets worse. Down close to the mud ring there is places where it was not, I should judge, one-eighth thick, not thicker than a knife blade; that is, a good-sized pocketknife blade. As you went down, the thinner it was, and the worse condition. While I did not sound it with a hammer—anything of that kind, as to whether it was crystallized or not—there were portions I thought was crystallized and part not. The iron top was excellent good condition. The iron on the bottom very bad condition. * * * Q. Did you examine what is called the mud ring? A. Yes, sir. Q. What was the condition of that as you saw? A. Poorly; bad condition. Q. Describe. A. The iron was thin, worn. Q. Thin and worn? A. Yes, sir. * * * Q. Did you examine the stay bolts? A. I did. Some of them were stripped, and some of them were in their place, broken. Some of them were stripped, the threads stripped off—stripped through the sheet, the threads stripped off; others broken right off at the sheet. Q. When the thread is stripped off, what does that indicate? A. Poor iron, poorly put in. Q. Did you say some were broken? A. Some were broken."

The testimony of these two witnesses is not merely as to a theory of what might have caused the explosion, but is a recital of facts, which, if believed by the jury, sustain the plaintiff's allegation that the defendant was negligent in placing its fireman on a locomotive supplied with an old, worn, defective, unsafe, and dangerous boiler. Further discussion cannot make it plainer that there was testimony which the court was bound to submit to the jury in support of the specific negligence charged against the defendant; and, though the jury might very fairly have found, from the testimony offered by the defendant, that its theory of the cause of

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the explosion was the correct one, the question was exclusively for their determination, and their finding as to it cannot be disturbed. Whether the appellant had discharged its full duty to the deceased by furnishing not merely reasonably safe and suitable appliances for the work to be done, but the best that could be procured, and by having the boiler regularly and carefully inspected, and by having made all proper repairs thereto, was a question for the jury. If the inspections were carelessly made by the inspector, the court properly held that the latter's carelessness was not that of a co-employee of the deceased. *Penna. & New York Canal & R. R. Co. v. Mason*, 109 Pa. 296, 58 Am. Rep. 722.

Finding no error in this record, which is that of a trial involving pure questions of fact, the judgment is affirmed.

DANIELS v. BOSTON & M. R. Co.

(*Supreme Judicial Court of Massachusetts, Hampden, Oct. 30, 1903.*)

[68 N. E. Rep. 337.]

Contracts—Lex Loci.

Where a contract is made in Vermont, and is to be performed in that state, the law of Vermont must govern the rights of the parties thereunder.

Same—Same—Waiver of Right to Discharge Employee.

A railroad company employed a system of discipline marks, which on any breach of duty were entered against an employee's name. An official wrote an employee that, while he should not wish to apply discipline against him, he must do so, in view of the frequent trouble with his office. The contract between the employee and the railroad was made in Vermont, and it was proved that under such circumstances, according to the Vermont law, the railroad company had waived its right to discharge the employee for any preceding breach, but that, if anything further occurred, the master would have that additional cause: *held*, that the railroad had elected not to discharge the servant.

Waiver of Right to Discharge Employee—Auditor's Findings—Conclusions.

A finding by the auditor that certain matters for which marks were applied were not waived, and that, until the use of the marks, defendant, by continuing to employ the servant with knowledge of his delinquencies, waived the same, were mere conclusions of law.

Same.

By continuing to employ the servant after knowledge of delinquencies, whether before or after the use of discipline marks, the master elected not to discharge the servant, but, as matters to be taken into account in case of a subsequent breach of duty, they were not waived.

Employment—Repudiation of Contract—Application for Leave of Absence.

A servant employed by a railroad company had written his superior relative to an increase of salary, which was refused, and subsequently the servant applied for a leave of absence for 30 days commencing June 16th, and thereafter the servant wrote: "I think you ask too much for \$30. I am ready to step out for 30 days if you will send a man to relieve me. * * * You agreed to deal with me fairly. You have declined to do this. * * * You know this sta-

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tion should pay not less than \$45;" and there was a request that a man be sent to commence June 16th: *held*, that the letter in question did not amount to a notification of the servant's refusal to work for 30 days after June 16th, nor to a repudiation of his contract on the servant's part, such as would entitle defendant to discharge him.

Wrongful Discharge of Servant—Damages.

In an action against a railroad for damages because of the wrongful discharge of a servant, a contention that merely nominal damages were recoverable was untenable, the contract being one where the servant was entitled to permanent employment, and had the option of continuing in the employment or not.

Same—Same—Probable Length of Life.

In an action for damages for the wrongful discharge of a servant under a contract whereby he was to be employed as a station agent so long as he performed his duty in a thorough, honest, and businesslike manner, evidence as to his probable length of life might be relevant on the question of damages.

Exceptions from Superior Court, Hampden County; John Hopkins, Judge.

Action by W. H. Daniels against the Boston & Maine Railroad Company. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions sustained.

J. B. Carroll and W. H. McClintock, for plaintiff.

Brooks & Hamilton, for defendant.

LORING, J. This is an action for breach of a written contract dated May 29, 1891, whereby the defendant agreed, in settlement of claims which the plaintiff had against it for personal injuries while in its employ as freight brakeman and freight conductor, to employ him as station agent at its station in Fairlee, Vt., so long as he should perform the duties of the place in a thorough, honest, and businesslike manner. The plaintiff began work as station agent at Fairlee on June 10, 1891, and was discharged on June 16, 1898. The defendant justified the discharge on the ground that he had been guilty of a number of shortcomings extending over nearly the whole of the period of his service. The case was sent to an auditor. It afterwards came on for trial before a jury. The jury were unable to agree, whereupon the judge directed them to find a verdict for the defendant, and the case comes here on an exception to that ruling. In submitting the case to the jury the presiding judge ruled that, if the plaintiff was entitled to recover, they could give him nominal damages only.

We are of opinion that the judge was wrong in directing a verdict for the defendant. The contract sued on was made in Vermont, and was to be performed in Vermont. The law of Vermont is the law which must be looked to in determining what would justify the defendant in discharging the plaintiff. The particular rule of law which is material here is how far the defendant corporation waived its right to discharge the plaintiff for a breach of duty by electing not to do so after the breach of duty came to its knowledge. A witness who

was duly qualified to testify to the law of Vermont was asked this question: "Supposing the railroad company were informed of the dereliction of duty of the employee, and the railroad company, through its proper officer having charge of the employee, wrote to the employee, 'We shall have to submit to the general superintendent the question whether a certain process of discipline will be sufficient to meet this case,' and we will suppose, after the matter was submitted to the superintendent, it was decided that a process of discipline would be sufficient, and the employee would be allowed to continue, would you not say that the railroad company had waived its right to discharge the employee for any preceding breach?" To this he replied: "I should say they had, if nothing further occurs; but, if something further of the same kind occurs, they would have that additional cause." The auditor found "such to be the law in the state of Vermont." The auditor's report was put in evidence at the trial, and no evidence was introduced there to contradict or control this finding of fact.

The last breach of duty on the plaintiff's part prior to the letter of June 4th, which the defendant relies on in connection with the plaintiff's previous shortcomings as a justification for discharging him, was in connection with the plaintiff's duty as telegraph operator at the station in question. The defendant was under a contract with the Western Union Telegraph Company to furnish a competent and reliable man to do their work, to be paid by the telegraph company. On May 28th, the defendant asked the plaintiff for an explanation of a delay in a message held at White River Junction from 2 p. m., May 26th, until 8:05 a. m. of May 27th, "on account of that office being unable to raise you." The plaintiff's explanation was that he was away on that day, and this man might have plugged the telegraph instrument while talking over the telephone and have forgotten to take it out when he got through speaking on the telephone. On June 3d the defendant's superintendent, Folsom, wrote to the plaintiff acknowledging receipt of his letter of explanation, and, after stating the facts, wrote: "While I should not wish to apply discipline against you on account of it if it was the first case of this kind, must do so in view of the frequent trouble we have with your office in connection with telegraphing; and you must, if you wish to remain there, so conduct the office as to avoid these complaints." It was found by the auditor that "in 1897 a system of 'discipline marks,' as it was called, was adopted by the defendant, by which was meant that in case of any failure on the part of an employee to properly perform duties required of him certain discipline or demerit marks were put down against his name on a record book kept in the office of the division superintendent." We are of opinion that the plaintiff is right in his position that the defend-

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ant elected not to discharge the plaintiff for the breach of duty in connection with the dispatch of May 28th, and the question arises whether the letter of June 4th was a breach of duty on the part of the plaintiff, which, taken with the previous shortcomings for which the defendant had elected not to discharge him, justified his discharge under the law of Vermont. The defendant has argued that under the findings of the auditor the question for the jury was whether the letter of June 4th, taken in connection with the previous delinquencies for which discipline marks were imposed, justified the defendant in discharging the plaintiff. The finding relied on here is that matters for which discipline marks were applied were not waived. But this and the preceding finding "that until the use of discipline marks, the defendant, by continuing to employ the plaintiff after knowledge of his delinquencies, waived the same," are conclusions of law, and are inaccurate, if not wrong. By continuing to employ the plaintiff after knowledge of his delinquencies, whether before and after the use of discipline marks, the defendant elected not to discharge the plaintiff for those shortcomings, but as matters to be taken into account in case of a subsequent breach of duty they were not waived. By continuing to employ the plaintiff after knowledge of a breach of duty the defendant waived its right to discharge him for that, but it did not waive the breach of duty, and in case of a subsequent shortcoming on the plaintiff's part the defendant had a right to take the plaintiff's whole record into account.

The question therefore arises whether the letter of June 4th alone or in connection with prior shortcomings of the plaintiff justified the defendant in discharging him; and we are of opinion that it did not. On June 4th the plaintiff wrote to the defendant: "Fairlee, Vt. June 4,—8. H. E. Folsom, Supt. Lyndonville, Vt.—Dear Sir: I think you ask too much for \$30.00. I am ready to step out for 30 days if you will send a man to relieve me. There can no man do the R. R. Co.'s work & live for \$30.00 here. I have tried to explain to you the additional business this station is doing, since I first took it, you agreed to deal with me fairly as to increase of compensation, as business materially increased. You have declined to do this, now I will take the matter up with some one else. You know & I know this station should pay not less than \$45.00. Will you please send man to commence June 16. Yours, W. H. Daniels." To understand this letter, and give it its proper construction, it becomes necessary to state that there was the following provision in the contract sued on: "In case of an increase or decrease of wages of station agents through the whole Passumpsic Division of said road, the compensation above named shall be subject to the same, and in case the business at said station should materially increase, said Daniels shall be fairly treated as to increase in compensation." There was evi-

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dence at the trial that the business at Fairlee had increased 40 per cent., and that, beginning with a letter from the plaintiff to Superintendent Folsom dated December 31st, the plaintiff had insisted that he was entitled to have his wages of \$30 a month increased to \$45 a month. This was refused by Folsom because there had been an increase in the work of other agents on the same division without an increase of pay. Six letters were written back and forth on the subject between December 31, 1897, and January 27, 1898. Then the matter seems to have been dropped until May 25, 1898, when the plaintiff wrote to Folsom a letter, which was not put in evidence, but which Folsom answered on June 3d as follows: "I cannot consent to any increase in the way of an additional man at your station before July 1st, but will then consider it." The plaintiff also testified that before he received an answer to his letter of June 4th he wrote to Folsom on June 10th as follows: "If you consent to allow me to be absent for 30 days commencing June 16, will you kindly send me pass for Boston & return for myself & wife. I had ought to get quite well rested by that time." Under date of June 9th Folsom wrote that he would relieve the plaintiff of the station on June 16th. On receipt of this the plaintiff wrote on June 11th that his request was "only for 30 days, that I may get rested. Am nearly sick enough and have been some time, to be confined to the house. Please let me hear from you." To this Folsom answered that, "In view of the record of discipline against you, taken with your letter of 4th inst., I decide to make the change permanent." The tone of the letter of June 4th is not all that it should be, but it cannot be taken to be so wanting in respect as to be an act of insubordination, having the discipline of the railroad in mind, and it seems to us that it is only as such that this letter could be argued to be a breach of duty. It may well be that the plaintiff was sincere in thinking that he was entitled to an increase of pay, and the tone of the letter may be explained, although not justified, by the fact that the superintendent's refusal to give the plaintiff an additional man and his imposition of discipline marks for the delay of the telegraphic message on May 27th were received by the plaintiff on the same day. The defendant has made no argument on this point, and we take up the only arguments which it occurs to us can be put forward in its support.

It is not necessary to consider whether, under the rule of *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, and *Ballou v. Billings*, 136 Mass. 307, the defendant could have rescinded the contract had the plaintiff's letter of June 4th been a notification of his refusal to work for 30 days after June 16th (which we assume would have been a breach of the contract—*Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522), and whether, in case the defendant had a right of rescission, the plaintiff had a right to retract his notice by the subse-

quent letter of June 9th, which he testified was written before Folsom's letter of June 10th was received. In our opinion, the letter of June 4th was not such a notification. In the letter of June 4th the plaintiff wrote, "I am ready to step out for 30 days if you will send a man to relieve me," and, "Will you please send man to commence June 16." That is not a notice of refusal to act as station master for 30 days after June 16th. It goes no further than a statement that he is "ready to step out" in case the defendant will send a man to relieve him for those 30 days, and a request that the 30 days begin June 16th. It cannot be held to be an absolute repudiation of the contract on the part of the plaintiff, or an absolute refusal on his part to perform his obligation under it, which would entitle the defendant to discharge him, assuming that the defendant on such a notification would have been entitled to discharge him finally at that time, on which we express no opinion.

The only contention made by the defendant in support of the ruling that nominal damages only could be recovered is that the elements of damage are too uncertain, and it relies on the case of *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862. But the case of *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488, decides that they are not. The contract in question in *Carnig v. Carr*, as in the case at bar, was a contract where the plaintiff had the option of continuing in the defendant's employ or not. It was held that it was enough that the defendant agreed to give him permanent employment if he wished it. The plaintiff had a right to permanent employment, and is entitled to damages for being deprived of that right. See, also, *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522.

Evidence of the probable length of life of a man of the plaintiff's age might be relevant on damages. But the question was not, in the first place, how long the plaintiff would be able to breathe, but how long he would be able to work; and by the terms of the contract his employment was not so long as he could work, but so long as he should perform the duties of the place in a thorough, honest, and businesslike manner.

Evidence of the plaintiff's income from the railroad, the express company, the telegraph company, and from his outside business during the last year prior to his discharge and his income during the first year after, was offered and excluded. Under the decision that the defendant elected not to discharge the plaintiff for his derelictions of duty, if it was found that he had been derelict, the question of the admissibility of this evidence will not come up again, as it did at the trial under consideration, and the question raised by this exception need not be discussed now. The other questions of evidence argued are not likely to arise in precisely the same way, and need not be passed upon.

Exceptions sustained.

ALABAMA & V. RY. CO. *v.* STACY.*(Supreme Court of Mississippi, Oct. 19, 1903.)*

[35 So. Rep. 137.]

Railroads—Killing Cattle—Liability—Evidence.*

Defendant in an action against a railroad company for the killing of a cow by a train is entitled to a peremptory instruction, on undisputed testimony of the engineer and fireman that they were on the lookout; that by reason of a curve the cow was first seen when 150 yards away, she then being 10 to 20 feet from the track, feeding; that she attempted to cross, when the train, going 25 or 30 miles an hour, was 60 or 70 yards away, when all efforts to stop were made, but without success, though the train was properly equipped, 420 yards being necessary to stop a train going that fast.

Appeal from Circuit Court, Hinds County; Robt. Powell, Judge.

. "Not to be officially reported."

Action by C. B. F. Stacy against the Alabama & Vicksburg Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Appellee, Stacy, brought this suit against the Alabama & Vicksburg Railway Company to recover of it the value of two of his cows, alleged to have been killed by defendant's train. On the trial, plaintiff proved that his two cows were found on defendant's railroad track just after one of its trains had passed, one of them being cut and bleeding, and the other bruised up, both dead, thus making a prima facie case of negligence under section 1808 of the Code of 1892, and rested. Defendant introduced its fireman and engineer in charge of the train that killed the cows. They both testified that the killing happened at a place where the track curved; that their engine, cars, brakes, and appliances were in good condition; and that their entire equipment was as good as any on any railroad in the state. The fireman testified that at the time of the accident he was putting in coal, and did not see the animals; that before he began to put in coal he was occupying his seat on the left of the engine, and was keeping a lookout, but saw no cattle; that, the first he knew of any trouble, the engineer blew his whistle and shut off steam, when he looked up and saw the animal that was struck, and that it was crossing the track, close in front of the engine; that the engine was running 25 or 30 miles an hour. The engineer testified that he was at his post, keeping a lookout; that he first saw the cattle on the south side of the track, about 150 yards ahead of the train,

*As to the credibility of employees as witnesses, see foot-note appended to *Brunswick & W. R. Co. v. Wiggins* (Ga.), 22 Am. & Eng. R. Cas., N. S., 588; *Houston E. & W. T. Ry. Co. v. Runnels* (Tex.), 12 Am. & Eng. R. Cas., N. S., 800, and note, 804 et seq.; *Hauss v. Lake Erie & W. R. Co.* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 864; *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

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some 10 or 20 feet from the track, feeding; that when the engine drew closer the cow attempted to cross the track, the engine being then 60 or 70 yards from her, and when he saw her start across he blew the whistle, put on brakes, and shut the steam off, so as to keep from striking her, but it was impossible to keep from striking her; that he did everything in his power to prevent the accident; that the train was going 25 or 30 miles per hour; and that a train running that fast could not be stopped in less than 420 yards. A peremptory instruction was asked by defendant and refused by the court. The case was submitted to the jury, and there were verdict and judgment for plaintiff. Defendant appealed.

McWillie & Thompson, for appellant.

Robt. Lowry, for appellee.

TRULY, J. This case is controlled in all its phases by Illinois Cent. R. Co. v. Walker, 63 Miss. 13; New Orleans & N. E. R. Co. v. Bourgeois, 66 Miss. 3, 5 South. 629, 14 Am. St. Rep. 534; Yazoo & M. V. R. Co. v. Whittington, 74 Miss. 410, 21 South. 249. The undisputed facts disclosed by this record entitled defendant to the peremptory instruction which was refused by the court below.

Reversed and remanded.

BRADBURN v. WABASH R. CO. *et al.*

(*Supreme Court of Michigan, Oct. 27, 1903.*)

[96 N. W. Rep. 929.]

Injury to Employee—Assumption of Risk.

The question of assumption of risk is independent of those of negligence and contributory negligence, and applies only to risks of dangers obviously incident to the employment, which dangers the employee knows or should know.

Same—Same—Brakeman Injured by Lumber Piled near Switch Track.*

A switchman does not assume the risk from lumber piles placed close to a switch track through a lumber yard, contrary to custom; he never having been there, and knowing nothing of the proximity of the piles, or of any fact from which he should have inferred it.

Same—Negligence—Brakeman Injured by Lumber Piled near Switch Track.

A railroad company knowing of the existence of lumber piles placed, contrary to custom, close to the switch track through a private lumber yard, is negligent in sending its switching crew there without apprising them of the danger.

Same—Contributory Negligence.

A switchman, who, while swinging himself to the brake beam at the rear of a car from its side, was struck by a pile of lumber close to the track, of which he did not know, and which he could not see on account of the darkness, was not negligent in failing to get on the brake beam at first, instead of getting on the side of the car as

*See monograph appended to Louisville & N. R. Co. v. Hall (Ky.), 8 R. R. R. 541, 31 Am. & Eng. R. Cas., N. S., 541.

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it passed him; there having been broken boards lying in the middle of the track, so that, if he attempted to get on the brake beam before the train started, he would be liable to stub his toes or fall.

Same—Notice of Dangers along Railroads.

A notice by a railroad company to its employees, purporting to give nonclearing points on its tracks, first described 11 distinct points, opposite which were the words, "Will not clear a man on top or side of a car." Next was a description of 17 distinct points, opposite which was stated, "Will not clear a man hanging on side of a car." Between the eighth and ninth of these points were the words, "Material piled alongside of tracks": *held*, that they described the character of the danger at the point specified immediately above them, and was not notice that material might be piled alongside any of the tracks.

Error to Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by William G. Bradburn against the Wabash Railroad Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Alfred Russell, for appellant Wabash Railroad Co.

Frederick W. Stevens, for appellant Pere Marquette Railroad Co.

Raymond E. Van Syckle, for appellee.

CARPENTER, J. Plaintiff sustained personal injuries while in the employ of the Union Terminal Association, a copartnership composed of the two defendants. He brought this suit for compensation, and recovered a verdict and judgment in the court below. Plaintiff received his injuries early in the morning of August 26, 1901, on a track known as the "Parker Siding," in the city of Detroit. He was then, and had been for about two years, employed in defendants' yard at Detroit, in charge of a switching train. This Parker siding was situated on the ground of private individuals, adjoining defendants' tracks on the north. It formed a junction with defendants' tracks at the property of the Detroit Gas Company. It ran in a westerly direction through the property of said company, and through some adjacent lumber yards, a distance of 377 feet, nearly parallel with defendants' tracks. On the morning in question plaintiff had occasion to take out of said siding four empty cars, which were located near the western end of the siding. After attaching these cars to the engine, plaintiff ordered the engineer to move said train to defendants' main track. When he gave this order, plaintiff stood on the north side of the siding, about 15 feet from the rear end of the rear car. (This rear car was a Hocking Valley gondola car—so described—of extra width.) He jumped on the moving car as it passed him, and stood in the stirrup that hung underneath its side, near its rear end. He then undertook to swing himself around the corner of the car to the brake beam which hung underneath its rear end, in order that he might not, as we infer, be injured by collision with a coal chute standing on the gasworks property, which

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came within six or eight inches of the track. Before he had completed this change in his position, his left foot, which he had not yet removed from the stirrup on the side, was caught and crushed between said car and a pile of lumber situated about 25 feet beyond the property of the gas company. This pile of lumber was in the lumber yard, and situated very close to the track. It was about 3 feet in height. It had been there from 60 to 90 days. Before plaintiff's injury, defendants had notified the proprietor of the lumber yard "to move the piles of lumber along said track." We think this testimony warrants the inference that the existence and situation of the particular pile of lumber under consideration was known to defendants, for it certainly interfered with their business as much or more than any other pile of lumber in said yard. Plaintiff testified that it was so dark at the time of his injury that he could not see the pile (though he made a vigilant use of his eyes), and that he had no prior knowledge of its existence. He explains this ignorance by testifying that he had never been on the siding before, that the lumber pile could not be seen from the main track because the view of it was hidden by other piles, and that he made his entrance into the siding on the occasion of his injury, not by passing up the siding, but by walking through the lumber yard from a point on the main track to a point near the end of the siding. He also testifies that when he reached the siding he noticed that lumber was piled all along the south side (except at intervals left for passageways) close to the track, while, so far as he could see, the north side was clear. Plaintiff also testifies that it is customary in lumber yards to pile lumber four or five feet from the track, so as to leave "room enough for a man to walk alongside and do his work." He also testifies that where platforms are found on one side of the track "the other side is always clear." Other witnesses testified that there was a custom in lumber yards to pile lumber close to the track only on one side, so as "to leave one side open for the shoving in and out of lumber out of a car door." There was evidence that plaintiff was notified in writing of certain points of danger in defendants' yard. This notice, as we shall point out later in this opinion, in our judgment had no material bearing on the case. It is contended by defendants that a verdict should have been directed in their favor, because: First, plaintiff's injury resulted from an assumed risk; second, there was no evidence of defendants' negligence; third, plaintiff was, as a matter of law, guilty of contributory negligence. It is also contended that the court erred in his charge to the jury respecting the construction of the notice served upon plaintiff.

1. Did plaintiff's injury result from an assumed risk? The principle which prevents recovery when an employee has assumed the risk should not be confounded—though it sometimes is—with the principle which prevents

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recovery when he himself is negligent, or when his employer is free from negligence. If the principle of assumed risk—as many seem to suppose—has application only to cases in which the employer would be held free from liability either on the ground that he has not been negligent or on the ground that the employee has been guilty of contributory negligence, it must be confessed that it is a principle of no great importance. While it must be conceded that the principle of assumed risk does sometimes furnish an additional ground for declaring the employer free from liability in cases where he is free from negligence and in cases where the employee is guilty of contributory negligence, that principle is nevertheless a distinct principle, and may be applied in cases in which the employer is negligent and the employee free from contributory negligence. The fact that the principle of assumed risk is sometimes applicable in cases where the employer is free from negligence and sometimes where the employee is guilty of contributory negligence only proves that the three principles—negligence, contributory negligence, and assumed risk—are consistent. It by no means proves their identity. The principle of assumed risk rests upon the ground that it is an implied contract between the employer and the employee that the employee shall assume the risk of all dangers obviously incident to his employment. See *Bauer v. American Car & Foundry Co.* (Mich.) 94 N. W. 9. The employee assumes the risk of all dangers obviously incident to his employment, whether the employer is negligent or free from negligence in exposing him to those dangers. If the employer is not negligent in exposing the employee to those dangers, he is not liable for any injury resulting, for two reasons: (a) He himself is free from negligence; and (b) the employee has assumed the risk. When, however, the injury to the employee results from an assumed risk to which an ordinarily prudent employer would not have exposed him, there can be no recovery; not because the employer was not negligent—for he was negligent—but because the employee assumed the risk. It is equally clear that the principle of assumed risk is not confined in its application to cases in which the employee is guilty of contributory negligence. Cases, of course, often arise, in which the employee has assumed a risk which an ordinarily prudent person would not assume; and these, of course, may be disposed of on the double ground of assumed risk and contributory negligence. Cases also arise where the employee has assumed a risk which it was not negligent to assume, and these must be disposed of, not on the ground of contributory negligence, but on the ground of assumed risk. Can we say in the case at bar, under the showing made by plaintiff, that he assumed the risk which caused his injury? The doctrine of assumed risk applies, and is limited

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in its application, to dangers which the employee either actually knows or should know. *Balhoff v. M. C. R. R. Co.*, 106 Mich. 606, 65 N. W. 592. Clearly, we cannot, without discrediting plaintiff's testimony, say that he actually knew the danger in question. Can we say that he should have known it? We cannot say that he should have known it, unless he should have inferred it from some fact or circumstance known to him, or open to his observation. If we credit his testimony there was no fact known to him from which he could have inferred this danger. Was any fact open to his observation from which he should have inferred it? If he had repeatedly passed in sight of this pile of lumber (see *Ragon v. Tol., A. A. & N. M. Ry. Co.*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Miller v. D., G. H. & M. Ry. Co.* [Mich.] 95 N. W. 718), or if there was a custom which should have led him to anticipate that it might be piled in close proximity to the track (see *Pahlan v. Detroit, etc., R. R. Co.*, 122 Mich. 232, 81 N. W. 103), it would be our duty to say that there was open to his observation some fact from which he should have inferred the existence of this danger. If his testimony is believed—and this was a question peculiarly for the jury—plaintiff had not, before this occasion, been in sight of this pile of lumber. Can we say that he should have anticipated the existence of this danger from the existence of a custom to pile lumber close to the track, open to his observation? If there was in fact such a custom, the case of *Pahlan v. Detroit, etc., Railroad Company*, supra, is an authority for the proposition that plaintiff was bound to notice it, and from it infer the existence of the danger to which he was exposed. There is, however, in this case, no evidence of such a custom, but, on the other hand, there is evidence that it was not customary to place these piles of lumber so close to the track. It is earnestly argued by the defendants that the testimony of the plaintiff respecting this alleged custom was inadmissible and insufficient on the ground that, "before a custom can be permitted to govern and modify the law in relation to the dealings of parties in any case, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it." We do not think the testimony of plaintiff is open to criticism under this rule. He himself testified that his business had taken him into the lumber yards of Bay City, West Bay City, and Detroit; that there was a custom, as before stated, to pile lumber four or five feet away from the track. This testimony is corroborated by other witnesses. One of plaintiff's witnesses testified, as heretofore stated, that there was a custom in lumber yards to pile lumber close to the track only on one side, so as to "leave one side open for shoving in and out of lumber out of a car door." If this testimony is true, the inference might properly be drawn that defendants knew of said custom—an inference

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which is supported by the circumstance that, as heretofore stated, they notified the proprietor of the lumber yard "to move the piles of lumber along said track."

Is there force in the possible suggestion that, because plaintiff assumed the risk of injury from collision with permanent structures adjacent to the siding, he assumed the risk under consideration? If plaintiff's foot had been crushed by collision with the coal chute, located only a few feet distant, then clearly, under the authority of *Pahlan v. Detroit, etc., Railroad Company*, supra, we are bound to say that he assumed the risk, and could not recover. That holding proceeds upon the theory: "If he is not acquainted with the particular dangers of the line upon which he is at work, it is his duty to give attention to them. He must be on the lookout for buildings near the track, and know what persons usually know of the uses of side tracks and such dangers as naturally follow." It was not intended by this decision to hold that an employee assumes risk of dangers which he neither knew nor should know. The decision proceeds on the theory that the employee should know what is usually known, and that "it is usual for sidings to be so constructed as to permit cars to stand close to buildings." Clearly, this decision is no authority for the proposition that an employee assumes risks which are unusual, and which are not in fact known to him. It can scarcely be contended that the decision is an authority for the proposition that the employee assumes the risk of dangers of every description which he may encounter while riding on the side of a car on a side track. It is not to be inferred from that decision that an employee must or must not ride on the side, on the rear, or on top of a car on a siding. That decision only illustrates the principle, often before declared (see *M. C. R. R. Co. v. Austin*, 40 Mich. 247; *Batterson v. Chicago & Grand Trunk Railway Co.*, 53 Mich. 125, 18 N. W. 584; *Pennington v. D., G. H. & M. Ry. Co.*, 90 Mich. 505, 51 N. W. 634), that the employee assumes the risk of all dangers usually incident to his work on the siding. He assumes such dangers whether he encounters them when riding on the side of the car, on top of the car, or on its rear. It was not intended by this decision to overrule *Balhoff v. M. C. R. R. Co.*, 106 Mich., at page 611, 65 N. W. 592, where we distinctly held that, if the employee neither "knew" nor "ought to have known" of the danger, he did not assume the risk. We cannot, therefore, hold that plaintiff's injury resulted from an assumed risk. Nor can it be contended that plaintiff's injury was due to his failure to save himself from the consequences of a collision with the coal chute. It may be fairly inferred from his testimony that he was taking the step necessary to prevent such collision.

2. Were the defendants free from negligence? The testimony of plaintiff tends to prove that the defendants knew of

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the existence of this pile of lumber, and exposed plaintiff to the danger which occasioned his injury. We think it clear that the jury could have inferred that an ordinarily prudent employer would have taken a different course. It is urged that the defendants are not liable, because they had no control of the lumber or of the ground upon which it was piled. It is sufficient to say of this contention that, though the defendants were not liable on the ground that the lumber was not properly piled, or removed, they were not justified in exposing plaintiff to this danger, known to them and unknown to him. See *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160. Though defendants could not have removed the lumber, they could have refused to use the siding in its defective condition, or they could have apprised their employees of the danger to which its use exposed them.

3. Was plaintiff guilty of contributory negligence? It is urged that the plaintiff was guilty of contributory negligence, because he did not at once get on the brake beam at the rear of the car, and also because due diligence on his part would have apprised him of the situation of the pile of lumber. It is sufficient to say, in answer to this claim, that plaintiff testifies that he could not get on the brake beam before the train started, "on account of broken boards lying in the middle of the track. If I did, I would be liable to stub my toes, or scrape my shins, or fall"; and that it was so dark that, though he looked, he could not see the pile of lumber in question.

4. Error in the charge of the court. Defendants introduced in evidence a printed notice signed by their superintendent. Its opening sentence was, "Below I give you nonclearing points on Union Station and Terminal Association's tracks." Then followed a description of 11 distinct points, opposite which were these words: "Will not clear a man on top or side of a car." Below was a description of 17 distinct points, opposite which was stated: "Will not clear a man hanging on side of a car." The eighth of these points was: "American Car & Foundry Company, Forge Department." Underneath this was printed, in the same type as used generally in the notice: "Material piled alongside of tracks." Below that was this: "Salt Sheds, 12th Street Yard." At the bottom of the notice was the following: "I have carefully read the foregoing, and hereby agree to thoroughly familiarize myself with the nonclearing points mentioned. [Signed] Wm. Bradburn" (plaintiff). At the same time plaintiff filled in in his own handwriting an application for employment containing this: "I have also received a list of the danger points, or places where special care is required of trainmen to prevent collisions with bridges above or obstacles at the side of the tracks, on the line of tracks of said association, and I agree to take notice of all such bridges and obstacles, and so perform my duties as not to be injured

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by them." It is the contention of defendants that this was a notice to plaintiff that material might be piled alongside of any of the tracks. The trial court, however, in speaking of this contention, said: "It does not seem to me that the notice in question—or the contract of employment, or the application for employment, whatever it may be—cuts as much of a figure in the case at bar as perhaps either of the counsel may think." Were the defendants prejudiced by this statement? If they are right in their claim that this was a notice apprising the plaintiff that he might find material piled alongside of any of their tracks, they were prejudiced. If, however, he was simply notified that material might be found piled alongside the tracks of the American Car & Foundry Company, they were not prejudiced. We think the words, "Material piled alongside tracks," related solely to the tracks of the American Car & Foundry Company. Our reasons are these: The notice purports to be an enumeration of "nonclearing points." Seventeen such points are clearly specified. Between the eighth and ninth of said points, and immediately below "American Car & Foundry Company, Forge Department," we find these words, "Material piled alongside of tracks." These words have no relation to the expressed object of the notice, except upon the theory that they describe the character of the danger at the point specified immediately above them. As a matter of fact, the testimony shows that at that point that particular danger existed. One receiving this notice would have a right, in our judgment, to place that construction upon it. If defendants intended to notify their employees that material might be found piled alongside of any of their tracks, there is no injustice in requiring them to make that intention manifest. In our judgment, therefore, the court did not err to defendants' prejudice by the use of the language complained of.

It results from these views that the judgment of the court below should be affirmed. The other Justices concurred.

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(*Supreme Court of Wisconsin, Sept. 29, 1903.*)

[96 N. W. Rep. 541.]

Street Railways—Steam Railroad Crossing—Flagman's Wages—Obligations of Vendor—"Successor."

Where defendant street railway company purchased from the owner of a previously existing railway all the equipment of such railway, but stipulated that the sale did not include the franchise, leases, contracts, or powerhouse machinery of the seller, the buyer did not thereby become the seller's "successor," within a contract obligating the seller and his successors to pay for the maintenance of a flagman at a steam railroad crossing.

Same—Same—Same—Same.

Where a street railroad company contracted to pay the wages of a

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flagman at a point where its line crossed the tracks of a steam railroad, the subsequent purchase of the street railroad's personal property by another company, which thereafter operated the same under an independent franchise, did not render the latter liable for the payment of such wages.

Same—Same—Same—Burdens Attached to Fee.

The obligation to pay such flagman's wages did not attach to the fee of the land at the crossing over which the street railway was constructed, so as to impose the burden thereof on the railway using the same.

Appeal from Circuit Court, Brown County: Samuel D. Hastings, Judge.

Action by the Chicago & Northwestern Railway Company against the Fox River Electric Railway & Power Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The respondent's street railway crosses appellant's steam railway on Third avenue, in the city of Green Bay. By an ordinance of the common council, on August 24, 1894, one David McCartney was granted a franchise to build a street railway in the city of Ft. Howard, now part of the city of Green Bay. He constructed a street railway, which was operated on the streets specified in this ordinance. Appellant railway company is owner in fee of the land abutting on the street where the street railway crosses the track of the steam railway. On November 5, 1894, a contract was executed, under seal, between McCartney and appellant, in which, among other things, it was agreed: "If at any time hereafter the business of the party of the first part—C. & N. W. Ry. Co.—or the laws of the state of Wisconsin, the ordinances of any municipal corporation of said state, or any other competent authority, or any agreement between the said party of the first part and any municipal corporation of said state, shall make it necessary to station flagmen at said crossing or shall make it necessary or proper to erect crossing signals or gates thereat, or shall require that said crossing be protected by a system of interlocking or derailing switches and signals, or if in the judgment of the party of the first part the safety and convenience of the parties hereto require that said crossing be so protected, in any such case, the party of the first part shall have the right to employ such flagmen or to establish such signals and gates, and the party of the second part will pay all the wages of such flagmen promptly as the same become due from time to time." The contract was made binding upon the heirs, personal representatives, successors, and assigns of the parties. The street railway crossing was constructed after this contract was made. The rails of the steam railway were cut, and the trolley wire crossed over its track and right of way. On or about July 1, 1899, McCartney's executors sold and conveyed to the McCartney Street Railway & Power Company

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all the rights, franchises, and privileges granted him by ordinances of the city, and also all his or their interest in the rails, poles, ties, wires, cars, right of way, and all other property and interest belonging to the electric railway. October 20, 1899, the McCartney Street Railway & Power Company conveyed, under a sale, to respondent company, all the rails, ties, wire, poles, cars, switches, turnouts, curves, and other personal property constituting the street railway equipment of this railway, excepting and "not including franchises, leases, contracts, or powerhouse machinery." On September 25, 1899, the city of Green Bay granted respondent the right to extend its line on Broadway, formerly Third avenue. March 23, 1900, this action was brought to compel respondent to pay the wages of the flagman at this crossing, under the provisions of this agreement. Respondent operates a trolley railway for carrying passengers. Its tracks cross appellant's tracks on Broadway and Fifth avenue, at the same place on the street where the McCartney Street Railway crossed it when originally constructed. The street existed prior to the time appellant became the owner of the abutting land. Appellant maintained a flagman at this crossing, as required by an ordinance, paying him his wages, which respondent refuses to pay appellant. This action is brought to recover the same.

Edward M. Hyzer, for appellant.

Greene, Fairchild, North & Parker, for respondent.

SIEBECKER, J. (after stating the facts). The respondent, as purchaser of the property, by contract with the McCartney Street Railway & Power Company of August 21, 1899, and a conveyance of it on October 20, 1899, did not expressly undertake to perform the conditions of the agreement upon which the appellant bases its right to recover in this action. The agreement of sale and the conveyance were, in terms of personal obligations, binding upon the parties only. They express nothing to indicate that the parties intended respondent should be required to pay the expense of a flagman provided for in the original agreement between appellant and David McCartney, the original builder and operator of the street railway. Respondent apparently sought to avoid assuming any of the obligations which were cast upon David McCartney for the maintenance of this crossing. It was specifically agreed that the purchase thus made was to include all the rails, ties, wire, poles, cars, switches, turnouts, curves, and other personal property constituting the equipment of this street railway, but stipulating that the transfer thus made was "not including the franchises, leases, contracts, or powerhouse machinery."

Then, again, the agreement conveys nothing but the personal property therein described. The sale of this personal property to respondent could not transfer any burden, duty,

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or obligation imposed on McCartney as a party to the contract, unless it assumed such burden, duty, or obligation as assignee.

That respondent was not the assignee sufficiently appears. Can it be said that it was the successor of David McCartney in operating its street railway system over this crossing? This view is met with the unsurmountable objection that McCartney had no valid franchise, nor any right of possession to the street, and that no "franchises, leases, contracts, or powerhouse machinery" were attempted to be transferred and conveyed to respondent. The respondent had a franchise from the city to operate and maintain a street railway over and upon the streets of the city at the place of crossing. The right to possession of the street under its own franchise and to maintain a street railway system is unquestioned. Its purchase of the personal property of the former company in place on the street, using and occupying the same place, while operating its street railway system, under its franchise, is no legal basis for holding it assumed the former owner's right of occupancy in the street at the place of crossing, and thereby had cast upon it the burden of paying the expense of maintaining this crossing. *Menasha v. Ry. Co.*, 52 Wis. 414, 9 N. W. 396; *Ry. Co. v. Ham.*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Wright v. Ry. Co.*, 25 Wis. 46.

The appellant asserts that the agreement is one which in legal contemplation must have been intended by the parties to be perpetual, and its benefits attach to the fee of the land over which the street railway is constructed and operated. The contract is primarily concerned as to operating the two railroad properties, where both rightfully pass over this place in a public street. The fact that the steam and street railways occupy the same place on the land emphasizes the legal result that these railways and the land are entirely distinct and independent properties—a transfer of either or both of the railway properties would in no way affect the interest in the land over which they pass, nor would a conveyance of the land necessarily affect their right to the use of this place upon it.

The agreements embraced in the original contract were in their nature personal obligations, pertaining to the conduct of the respective railway enterprises, and did not attempt to grant any rights to the use of the real estate to McCartney which were not an incident to a valid franchise for operating a street railway. The right to use this land at the crossing does not arise out of this contract, nor can it be said that such use by the two railways is an interest in or annexed to the realty, but it is in its effect collateral and independent of the land as regards the tenure and enjoyment thereof. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Menasha v. Ry. Co.*, *supra*; *Ry. Co. v. Ry. Co.*, 41 Minn. 461, 43 N. W. 329;

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Wiggins v. Ry. Co., 94 Ill. 83; Morse v. Garner, 1 Strob. 514, 47 Am. Dec. 565.

The foregoing conclusion is based on the assumption that the contract between appellant and David McCartney was valid. This is challenged by respondent. The view we have taken of the case makes it unnecessary to discuss this question. We must hold that the contract in question was not binding on respondent.

The judgment of the circuit court is affirmed.

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(*Supreme Court of Indiana*, Oct. 9, 1903.)

[68 N. E. Rep. 166.]

Death by Wrongful Act—Sufficiency of Complaint.

If the complaint in an action for the negligent killing of plaintiff's decedent states a cause of action on any theory, from the facts therein alleged, it is sufficient against a demurrer.

Negligence—Pleading and Proof.

Where a complaint charges several acts of negligence on the defendant's part, it is sufficient on trial, to prove that the injury complained of resulted from one of the negligent acts charged.

Death of Brakeman—Negligence in Backing Train in Switchyard—Sufficiency of Complaint—Statute.

A complaint against a railway company for negligently causing the death of a brakeman in its employ, stating that he was uncoupling a train standing across a highway in a switchyard in the nighttime, and, while giving the required signals to the engineer, was killed by the negligent backing of another train along a near parallel track, without warning, signal, or light, stated a cause of action under Burns' Rev. St. 1901, § 7083, declaring a railway company liable for injury to employees caused by the negligence of any person in its service who has charge of any switchyard, locomotive engine, or train; and it was not necessary that the complaint allege that the company owed decedent the duty of having a light or watchman on its cars, or to give signals.

Same—Same—Same—Same—Crossing Signals.

The complaint was sufficient, whether or not the statute requiring signals for highways applies to highways crossing a switchyard.

Same—Pleading.

Allegations in a complaint that a railroad corporation itself negligently run its train against an employee and killed him excluded the theory that the negligent act charged was done by persons for whose acts the company was not responsible.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Lucinda Barnes, administratrix, against the Chicago, Indianapolis & Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Case transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

E. C. Field and W. S. Kinnan, for appellant.

Whittington & Whittington, for appellee.

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JORDAN, J. Action by appellee against appellant for the negligent killing of her decedent. Trial by jury, and a general verdict awarding damages in the sum of \$2,500, together with answers to numerous interrogatories, returned. Over motions by appellant for judgment on the answers to the interrogatories and for a new trial, judgment was rendered on the general verdict. The errors assigned relate to the overruling of the demurrer to each paragraph of the complaint, and to the overruling of the above-mentioned motions.

The complaint appears to have been unskillfully drafted, and abounds in repetition. We have, to an extent, summarized the first paragraph of the complaint, and gathered therefrom the following facts: Appellee is the administratrix of George E. Coombs, deceased, and appellant is a railroad corporation duly organized, operating and controlling a railroad running through the state of Indiana, which, among others, runs through the counties of Montgomery and Monroe. On and prior to the 2d day of December, 1899, Coombs, the decedent, was in the employ of appellant as a brakeman, serving it as such on one of its freight trains which ran over its said railway. Immediately beyond the corporate limits of the city of Bloomington, in Monroe county, Ind., appellant on and previous to the aforesaid date had a switchyard, wherein it negligently constructed and maintained, as alleged, several switch tracks or sidings, and also a roundhouse and telegraph station. These side tracks or switches were about one-fourth to one-half mile in length, and parallel with the main railroad track. The distance between these switch tracks was from 6½ to 7 feet, and freight cars running thereover would, it is alleged protrude and extend over and beyond the track or tracks to a distance of from 2 to 2½ feet. The open space between the cars when running or standing on opposite tracks in the said switchyard did not exceed 3 feet. Thereby the space between the cars was not sufficient to enable brakemen to discharge their duties as such in the said yard with reasonable safety. About midway of the switchyard a public highway runs east and west, and crosses the main and switch tracks situated in the said yard. This highway is used and traveled by the public generally. On the date of the fatal accident, to wit, December 2, 1899, one of appellant's freight trains, upon which the decedent was employed and serving as a brakeman, was going south over appellant's road. It was composed of a locomotive engine and a large number of freight cars. Upon the arrival of this freight train at the aforesaid switchyard, it was run into the yard, onto track No. 3, and was moved through the yard towards the south until the engine and a part of the cars thereof had crossed the aforesaid highway, when it was stopped, thereby causing a part of the train to block or obstruct said highway. It is alleged then that Coombs, the decedent, while acting in the line of his duty as a brakeman

on said train, and in compliance with the rules of appellant controlling the operation of said train by its servants, and also in compliance with and in obedience to the laws of the state of Indiana, prohibiting the obstruction of public highways, alighted from the train, on the west side thereof, onto the said highway crossing, for the purpose of uncoupling the cars of the train, in order that it might be cut apart, and the cars thereof which were obstructing the highway crossing removed therefrom. When the train reached the switchyard, and at the time said Coombs alighted therefrom, it was about 9 o'clock, at night, and very dark; there being no lights of any kind whatever either at any point in the switchyard, or at the crossing of the said highway. Coombs, when he alighted from the train, and at the time he was engaged in the line of his work, as hereinafter mentioned, neither saw nor heard any train on the side track immediately next to the track upon which his said freight train was standing. He was engaged in his duties east of track No. 2, and was between tracks No. 2 and No. 3, and was standing at the time of the accident as near to the latter track as it was possible for him to be, and was then and there engaged in uncoupling the cars of his train, and in giving and receiving signals from those in charge thereof. The engine attached to his freight train, together with other engines in the yard near by, was blowing off steam, and made such a noise that it was impossible for him to hear the running or approach of any train on track No. 2. While in the line of his duties and discharging the same as aforesaid stated, the defendant railroad company carelessly, negligently, and recklessly backed and run, from the south, a train, consisting of 15 freight cars and a locomotive engine, along, over, and upon track No. 2, backing and running the said train over and across the said public highway. One of the cars of the said train, in the north end thereof, was a very large box car, and, including the projections thereof, was about 10 feet, and over, in width. There was no light upon the said train, and it was run and backed with no watchman or lookout thereon, and no signal whatever of its approach was given. The bell on the engine at no time was rung when the train was in motion. Neither was the engine whistle sounded at any time when the said train was being backed down to the said highway crossing. It is disclosed, in general, that no signal or warning whatever, of any kind, was given by the defendant of the approach of said train; and it is alleged that the engine bell of said train was not rung, nor was the engine whistle sounded, when the said train was within 80 rods of the said highway crossing, nor at any point when the train was approaching the said crossing where the decedent was engaged in uncoupling cars and in giving signals, as aforesaid stated. Said train and cars struck and killed said decedent while engaged in the discharge of his duties as hereinbefore alleged. It is further charged

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that the defendant so negligently constructed its side tracks and switches at the said highway crossing where the decedent was killed as aforesaid that the space between the cars on the train upon which he was brakeman and the cars of the train by which he was killed did not exceed 2½ feet. Coombs had no knowledge whatever of the approach of the train at the time he was killed, and no warning was given him by the defendant of the danger to which he was exposed. At the close of the pleading, among other things, it is alleged "that by reason of the defendant's negligence in not having a light or a watchman at said highway crossing, and in not having a light, signal, person, or watchman on said car and train thus pushed over said track and highway crossing, and in not sounding the whistle nor ringing the bell on said engine of said train, and by reason of said defendant's negligence in not giving any signal or warning whatever of the approach of said train to the crossing of said public highway, and by reason of said defendant's negligence in pushing a train of fifteen freight cars ahead of an engine attached thereto, and by reason of all the negligent acts and omissions of said defendant herein set forth, plaintiff alleges that said defendant negligently and carelessly injured and killed said George E. Coombs."

The second paragraph of the complaint is substantially as the first; hence, if the latter is sufficient to withstand a demurrer, it necessarily follows that the former can be upheld. It is insisted by counsel for appellee that the complaint sufficiently discloses several acts of negligence which will render the railroad company liable either at common law or under the employers' liability act, being section 7083, Burns' Rev. St. 1901. By this section it is provided, "that every railroad company * * * operating in this state shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence in the following cases: * * * Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * switch yard, locomotive engine or train upon a railway."

Appellant's counsel urge that the complaint is insufficient on demurrer, because it does not charge that appellant owed the decedent any duty in regard to the operation or running of its train in its switchyard at the time of the accident. It is said that the only duty owing by appellant was to properly construct and maintain its tracks. This duty, it is asserted, the law imposed upon the railroad company, and that a violation of this duty is the only one charged in the complaint. The further contention is that the duty of appellant to have a light or watchman on its cars, or to give signals or warning in regard to the movement or running of its trains in the switchyard in question, was not a duty imposed by any stat-

ute or ordinance, and did not arise out of any general law applicable to the case. It is contended that, if such a duty existed, it should have been expressly shown under the averments of the complaint. It is claimed that it is not disclosed to have been the custom of appellant, previous to the accident, to have a lookout or watchman or light upon its cars when they were being backed or run on the tracks in the switchyard, or to give any warning or signals upon such occasions by ringing the engine bell or sounding the whistle. It is urged that under such circumstances no duty to do so could arise either by operation of law or in fact. As there are no facts averred in the complaint in respect to a pre-existing custom or practice in regard to giving signals or warning of the running or movement of trains in appellant's switchyard, the insistence is that there is nothing shown in this respect upon which decedent had a right to rely. The contention is finally made that the complaint wholly fails to disclose any duty of appellant, for a breach of which it would be liable for the death of appellee's decedent.

In considering the sufficiency of the pleading in controversy, it may be said that our Civil Code declares that the complaint in an action shall contain a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. If it can be determined that the complaint in this case states a cause of action upon any theory, from the facts as therein alleged, it must be held sufficient to withstand a demurrer. It appears that the pleader, in drafting it, has attempted to charge several acts of negligence upon the part of appellant. In regard to such practice, it may be said that the rule is well affirmed that a complaint may allege several acts of negligence, and on the trial it will be sufficient to justify a recovery if it be established that the injury complained of resulted from one of the negligent acts as charged in the complaint. *Long v. Doxey*, 50 Ind. 385; *The Diamond, etc., Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242, and cases there cited; *The Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128; 12 Ency. of Pl. & Prac. 345. We are satisfied in this case that the complaint, under its averments, sufficiently discloses such negligence upon the part of appellant's servants in charge of its freight train in the switchyard, by which decedent was killed, in running and operating the same, as will render the railroad company responsible for his death, by virtue of the provisions of clause 4. § 7083, *supra*, as hereinbefore set out. This we think may be said to be the main or principal theory of the complaint, as outlined by the facts therein alleged. Under the circumstances and conditions described, the negligent running and operation of the train is shown to have been the proximate cause of the fatal accident. The deceased at the time he was killed was engaged in the line of his duty at work between tracks No. 2 and No. 3, un-

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coupling the cars of his train, which, as it appears, had been stopped on track No. 3, and was giving the required signals to the engineer—all, as it appears, for the purpose or in order that the train might be cut apart, and the cars removed from the public highway crossing which they were temporarily obstructing, all of which he was doing, as it is disclosed, in compliance with the rules and requirements of appellant. The accident occurred in the darkness of night, when there was an entire absence of lights in the switchyard and at the public crossing. It is shown by the averments of the complaint that the train which killed decedent was negligently, carelessly, and recklessly run by the defendant across the public highway where he was engaged in his work, without having either watchman or lights thereon, and without giving any signal or warning whatever of its approach. Had there been any signal or warning given of the running or approach of this train to the point at the highway crossing where he was at work at the time, or any precaution whatever exercised by appellant, or its servants in charge of the train, in running or operating the same, it is reasonable to suppose that the deceased would have been warned or admonished in time to have escaped the accident. He was not bound to anticipate that appellant, under the circumstances, would back its train through the switchyard, down to and across the public highway, without giving some signal or warning. He was, as shown, where his duty called him; and appellant owed the duty, under the circumstances, not to subject or expose him to peril of danger as it did. It is not the rule, as counsel for appellant contend, that the complaint should positively charge that appellant at the time of the accident owed the decedent a duty. It was not necessary to allege in the complaint that a certain act or line of conduct was a duty imposed upon appellant by law, for, as a rule, the law implies the duty from the facts stated or alleged in the pleading. It is elementary that a conclusion of law is not required to be alleged. *Cribben v. Callaghan*, 156 Ill. 449, 41 N. E. 178; *Railroad Co. v. Coit*, 50 Ill. App. 640. The rule affirmed by repeated decisions of this court is that a general averment of negligence has a technical signification, and, in an action for negligence, if a legal duty and a violation thereof are disclosed, the general averment of the negligence complained of will be sufficient on demurrer to sustain the charge. Under the facts as alleged in the complaint, both the legal duty which appellant owed to the deceased, as its servant, and the violation of such duty, are sufficiently shown. Absence of any knowledge on the part of the decedent at the time he was killed of the danger or peril to which appellant exposed him, and which resulted in his death, is expressly shown by the averments of the complaint. It will be observed that the pleader charges in the complaint that the defendant (that is, the railroad corporation itself) negligently and carelessly run its train upon and across the public highway, and upon and against the said

decedent, and thereby struck and killed him. These allegations exclude the theory that the act or acts of negligence were done by persons for whose conduct the defendant was not legally responsible.

Appellant's counsel earnestly contend that neither the railroad company, nor its servants in charge of the train which killed the deceased, owed any duty to give the statutory signals when the train was approaching the public highway crossing in the switchyard. It is contended that this statutory requirement does not extend to the running or movements of trains in a switchyard, and can have no application where a servant of the company is injured in a switchyard, as was the deceased in this case. As to whether the provisions of our statute which require signals to be given by railroad companies when their trains are approaching public highway crossings is applicable under the facts in the case at bar, we need not decide, for, aside from the requirements of this statute, the complaint, on the question of negligence, is sufficient. The language and reasoning of Baker, J., speaking for the court, in the appeal of Indianapolis Union Railway Company v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, are quite pertinent and applicable to the question herein involved. In that case it is said: "Conceding that the engineer's statutory duties to sound the whistle and ring the bell on approaching a highway crossing, and to stop his engine before crossing an intersecting railroad, do not apply in this case, it does not follow that the engineer owed no duty to appellee. It was his duty to exercise that diligence for appellee's safety which a man of ordinary prudence would have exercised under like circumstances." See, also, Stoy v. L. E. & St. L. R. Co. (at last term) 66 N. E. 615.

The facts alleged in the complaint under consideration fully establish that the servants of appellant in charge of the train in controversy, and for whose negligence in the premises the statute holds the railroad company responsible, did not, in the running and operation of the train, under the circumstances, exercise that diligence or care for the safety of appellee's decedent which a person of ordinary prudence would have exercised under like or similar circumstances. We conclude that the complaint states a good cause of action, and the demurrer thereto was properly overruled.

In answer to the contention that judgment should have been awarded appellant upon the special findings of the jury, it may be said that there is no such antagonism between the general verdict and the special findings of fact as would defeat the former. There was no error in denying that motion. There is evidence in the record which supports the general verdict, and also the material facts found by the jury in their answers to the interrogatories propounded.

We have considered all the questions presented by appellant's learned counsel, but find no error, and the judgment is therefore affirmed.

SOUTHERN RY. CO. *v.* HEYMANN.*(Supreme Court of Georgia, Aug. 14, 1903.)*

[45 S. E. Rep. 491.]

Shipment of Intoxicating Liquor—Seizure by Authorities—Arrival in State—Federal Statute.

Intoxicating liquors which have been shipped from Augusta, Ga., to persons in Charleston, S. C., and which have reached Charleston, and been placed in a freight warehouse of the railroad company in that city, to await the call of the consignees, have "arrived" in the state of South Carolina, within the meaning of Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], known as the "Wilson Act," which provides that "all fermented, distilled, or intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory."

Same—Same—Liability of Carrier.*

A railroad company is not liable for loss of property intrusted to it for shipment, occasioned by seizure of the property by an officer of the law under a prima facie valid authority.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; E. L. Brinson, Judge.

Action by Paul Heymann against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming and G. M. Beasley, for plaintiff in error.

Saml. H. Myers, for defendant in error.

CANDLER, J. Heymann, a wholesale liquor dealer in Augusta, made two shipments of whisky over the Southern Railway to persons in Charleston, S. C. Upon reaching Charleston, the whisky was placed in a warehouse of the railroad company, where it was shortly afterwards seized by constables, under what is known as the "Dispensary Law of South Carolina." That law provides that "the transportation, removal, or taking from the depot or other place, by consignee or other person, or the payment of freight or express or other charges * * * upon any spirituous or malt, vinous, fermented, brewed, * * * or other liquors, or any compound or mixture thereof, * * * is prohibited"; that

*Whether carrier liable for nondelivery of freight seized by public authorities under police regulations, see note, 21 Am. & Eng. R. Cas., N. S., 507; St. Louis S. W. Ry. Co. *v.* Gans (Ark.), 21 Am. & Eng. R. Cas., N. S., 498; Farmers' Loan & Trust Co. *v.* Northern Pac. Co. (N. Y.), 1 R. R. R. 562, 24 Am. & Eng. R. Cas., N. S., 562 (freight held as contraband of war).

As to whether a carrier is liable for nondelivery of freight seized while in its custody under legal process, see note, 21 Am. & Eng. R. Cas., N. S., 505 et seq.

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“all such liquors, except when bought of a state officer authorized to sell the same, * * * are declared to be contraband and against the morals, good health, and safety of the state”; and that all such liquors are “to be seized, wherever found, without a warrant, and turned over to the state commissioner.” Heymann had guarantied delivery of the whisky to the consignees, and was compelled to return to them the purchase price, which they had paid. He sued the railroad company, and obtained a verdict for the price of the whisky. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. It is apparent that the decision of this case depends upon two questions: First, was the seizure of the whisky by the constables in Charleston a *prima facie* valid exercise of legal authority? and, second, if it was, did that fact excuse the railroad company from liability on account of the loss of the goods intrusted to it for shipment? In order to determine the first question, it becomes necessary to decide whether, at the time of the seizure, the interstate shipment of the goods had been completed; for if they were still in the course of interstate transportation, the seizure by the constable was not even *prima facie* legal, for the very law under which the seizure was made had, prior to such seizure, been declared by the Supreme Court of the United States to be unconstitutional in so far as it interfered with interstate commerce. *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632. It therefore follows that, if the shipment had not been completed at the time the goods were seized, the railroad company would have no right to defend on the ground that it submitted to the superior authority; granting that such a defense, if established, would relieve it from liability. In support of the contention that the interstate shipment had not ended, counsel for the defendant in error relies upon the case of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. In that case the court held that an Iowa statute which prohibited any express or railway company from transporting or conveying intoxicating liquors between points or from one place to another within the state, without first having been furnished by the county auditor of the county to which the liquor was to be transported, or was consigned for transportation, a certificate that the person to whom the liquor was to be transported was authorized to sell such intoxicating liquors in such county, did not apply to a box of spirituous liquors shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that state, while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa law to be repugnant to the Constitution of the United States; and that moving such goods in the station from the platform on which they were put on arrival to the freight warehouse is a part of the interstate commerce transportation. It is argued that, under the ruling in the *Rhodes*

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Case, an interstate shipment is not complete until the goods are delivered to the consignee; that not until such delivery can they be said to have "arrived," within the meaning of Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U S Comp. St. 1901, p. 3177], commonly known as the "Wilson Act," which provides that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." If this contention be correct, then the judgment of the lower court must be affirmed, for the railroad company could not relieve itself of liability by reason of the fact that it yielded to the exercise of a palpably illegal and unwarranted authority. We do not, however, draw the same conclusion from the argument in the Rhodes Case as does counsel for the defendant in error, as we do not find in that case any authority for the proposition laid down, or any reason for a ruling on that proposition. The Rhodes Case holds nothing more or less than that the movement of a package of goods from the platform of a station to a freight warehouse (the goods having been shipped from outside the state) is a part of the interstate transportation, and that the servant of the railroad company, so moving the package, could not be convicted under the state statute under consideration. There was no question in the case as to whether or not the interstate shipment was completed upon reaching the warehouse, or if delivery to the consignee was necessary to complete such transportation; and while some of the language used by Mr. Justice White in delivering the opinion would seem to indicate that he considered delivery essential to an "arrival," under the Wilson act, that point was not in issue, and was not ruled. We think it far more consistent with the evident purpose of the Wilson act to hold that when the goods have been placed in the railroad company's warehouse in readiness for the call of the consignee, the interstate transportation is at an end. The goods have "arrived," within the meaning of that act, and are at once subject to the state law passed in the exercise of its police power. Under the Rhodes Case, so long as the goods are being moved to the ultimate end of their railroad journey, they are in the course of interstate transportation. Under the law of Georgia, when they are placed in a freight warehouse, after having been shipped within the usual time required for transportation, the relationship of carrier and shipper ceases, and the railroad company becomes simply a warehouseman, and this without the necessity of notifying the consignee of their arrival. Georgia & Alabama Ry. v.

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Pound, 111 Ga. 7, 36 S. E. 687, and cases cited. If, then, the goods were in Charleston in the hands of a bailee, awaiting the call of the consignee, we fail to see how it can be said, without manifest absurdity, that in any sense they had not arrived in the state of South Carolina. In support of the view here announced, we call attention to the recent case of *State v. Intoxicating Liquors* (Me.) 49 Atl. 670. There it appeared that certain liquors were shipped from Boston, Mass., to Machias, in the state of Maine, consigned to the shippers. They arrived at Machias, and were transferred to a freighthouse used exclusively by the railroad company, where, on the afternoon of the day following their arrival and storage in the warehouse, they were seized by officers, under the provisions of the Maine law. There had been no delivery of the liquors, and no notice given to any one of their arrival. It was held "that the liquors in question, at the time of their seizure, had arrived within the state, so as to be subject to the operation and effect of the laws of this state enacted in the exercise of its police powers, within the meaning of the act of Congress of August 8, 1890, commonly known as the 'Wilson Act.' " Commenting upon the case of *Rhodes v. Iowa*, supra, the court in the opinion (page 672) say: "It is true that in the opinion of the court this language is used: 'We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee.' But it does not seem to us that this was necessarily involved in the question decided. If the act of moving the package from the platform to the freighthouse was a part of the interstate commerce transportation, as the court held it was, and the transportation was not consummated until the package had been moved to and deposited within the freighthouse, so that the liquors had not arrived within the state until that act had been performed, then the Iowa statute could not apply to any part of such transportation, and it was unnecessary to a decision of the point involved to hold that such transportation was not completed until delivery to the consignee." The same distinction as to the *Rhodes Case* was made in the case of *Southern Express Co. v. State*, 114 Ga. 226, 39 S. E. 899, where it was held that, "relatively to a package of whisky shipped by express from another state to a named person in a designated city in this state, to be there delivered to him upon his paying to the agent of the express company at that point a stipulated price therefor, the penal laws of this state in reference to the unlawful sale of intoxicating liquors become of force when such package has reached the point of its destination, and is being held by such express agent, until the sale of the whisky has been completed, in accordance with such

directions of the consignor." It is urged, however, that the following language in the opinion in the Southern Express Company Case is authority for the position taken by the defendant in error: "The purpose of the shipment must be taken into consideration. If that purpose had been simply that the package of liquor, upon reaching the hands of the express company's agent at Dalton, should, upon payment of the express charges thereon, be delivered to the consignee, then, perhaps, under the decision in the Rhodes Case, the package had not arrived until the consignee received it from such agent." It is, of course, apparent that this language does not constitute a ruling by the court, but was merely a passing observation as to what might "perhaps" be the ruling made in the hypothetical case given, in the event the court should see fit to be guided by the obiter dicta of the Rhodes Case. In the light of what has already been held in this opinion, it is unnecessary to say more on this subject than that the language quoted has no bearing, even arguendo, upon the case now under consideration.

2. The foregoing discussion leads us to the conclusion that the seizure of the whisky by the constables in Charleston was at least prima facie legal, and it is next in order to consider whether the railroad company will be excused from liability for the loss of the goods by reason of having submitted to the authority of the officers. The contention of counsel for the defendant in error is that, as a common carrier, the railroad company was an insurer of the goods intrusted to it for shipment, and would only be relieved from liability by showing that the loss was occasioned by the act of God or the public enemy. Civ. Code 1895, § 2664, provides that in cases of loss the presumption of law is against the carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. But, as was said by Judge McCay in Savannah R. Co. v. Wilcox, 48 Ga. 437, "this has always been qualified with certain limitations as to when his liability ceases, when he is discharged from further prosecution of his undertaking, as if * * * they have been taken from him by legal process." "Like every other person, the carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed. * * * If the goods, without his fault, are or become obnoxious to the requirements of the public power of the state, and are injured or destroyed by its authority, as in the case of * * * intoxicating liquors intended for use or sale in violation of law, the carrier cannot be held liable." Hutch. Car. (2d Ed.) §§ 210b, 210c. The reason for such a rule is at once apparent, for to hold that a railroad company is bound to resist the lawful authority in protecting the goods of a shipper would be to lay down a doctrine dangerously approaching anarchy. In the present case, it was in evidence that the whisky was

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seized by duly-appointed officers of law of the state of South Carolina, and that they were acting within the authority of a statute of that state. We are not prepared to hold that the railroad company was bound to test the validity of the statute under which the goods were seized by resisting the seizure, for to do so would be to entirely change the contract of carriage, and impose upon the carrier a burden greater than it undertook, or in reason and common sense ought to bear.

We conclude, therefore, that the verdict rendered by the jury in the court below was contrary to law, and should have been set aside on motion for a new trial.

Judgment reversed. All the Justices concur, except LAMAR, J., disqualified, and TURNER, J., not presiding.

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(*Supreme Court of Mississippi, Nov. 2, 1903.*)

[35 So. Rep. 168.]

Injury to Passenger—Damages—Instruction.

In an action for injuries to a passenger, an instruction that, if the jury believed the facts therein stated, the carrier was liable to plaintiff in damages in such a sum as the jury should "see fit to assess under the instructions of the court" as given for the plaintiff, was erroneous; the jury being bound to assess only such damages as were shown by the evidence under all the instructions given on behalf of both parties.

Same—Carrying beyond Station—Punitive Damages—Insufficiency of Evidence.

Where a passenger was carried past his station, and was compelled to walk back from the next station during the nighttime, by which he was made sick, sore, and lame, and defendant's evidence tended to show that the train stopped at his station, and that many passengers got off there, it was not error for the court to refuse to charge the jury to allow plaintiff punitive damages.

Appeal from Circuit Court, Yazoo County; Robt. Powell, Judge.

Action by Frank P. Smith against the Yazoo & Mississippi Valley Railroad Company. From a judgment in favor of plaintiff, defendant appeals and plaintiff prosecutes a cross-appeal. Reversed and remanded on appeal, and affirmed on cross-appeal.

The evidence shows that plaintiff purchased an excursion ticket at Bentonia, a station on defendant's road, to Ways Bluff and return, to attend a barbecue there; that he attended the barbecue, and returned, reaching Bentonia about 10 o'clock at night; that the train was crowded with excursionists, and the station was not called when Bentonia was reached, but the train stopped, and plaintiff stated that he knew that they had reached Bentonia. The testimony for plaintiff was to the effect that the train did not stop long

enough for him to get off, and he was carried to the next station, about four miles distant, and had to walk back in the night to Bentonia, where his team was; that he lived several miles from Bentonia, and because of this walk his feet were blistered, and his legs were sore and tired, and that for five or six months he limped and suffered pain and inconvenience; that at the time the train was pulling out from Bentonia the steps of the cars were crowded with people; that the conductor had not been seen for a considerable time, and was in a forward coach, talking to some ladies, and his lantern was not lighted, and that the train, after a very short pause at Bentonia, started off, leaving the passengers to get off the best they could, and some—plaintiff among them—were carried on to the next station; that, after plaintiff left Bentonia, plaintiff requested the conductor to stop the train and let him get off where they were, near Anding, the first stop from Bentonia, but made no effort to stop while they were near Bentonia. There was evidence for defendant that the train stopped at Bentonia, and that it was delayed there an unusual length of time, and many passengers got off there. The plaintiff asked the court, in his seventh charge, to instruct the jury that they might give plaintiff punitive damages. This charge was refused, and the court instructed the jury, for defendant, that they could not inflict such damages. There were verdict and judgment for plaintiff for \$250, from which defendant appeals; and plaintiff prosecutes a cross-appeal, assigning as error the refusal of his seventh instruction, and giving the instruction for defendant which denied him punitive damages. The opinion of the court contains a further statement of the facts.

Mayes & Longstreet, for appellant.

Henry & Barbour, for appellee.

TRULY, J. The first instruction for plaintiff is fatally erroneous. By it the jury was told that, if they believed the facts therein stated, "then the defendant is liable to plaintiff in damages in such sum as the jury shall see fit to assess under the instructions of the court as herein given for plaintiff." This is not the law. Verdicts must be based upon the facts of the case, not upon the whims or wishes, the likes or dislikes, of the members of the jury. A verdict should be, not what the "jury sees fit to assess," but according to the very rights of parties as shown by the evidence. A further vice in this instruction is that it restricts the jury in their assessing of damages to a consideration of the instructions "given for the plaintiff." This is error in any state of case, but particularly when, as in this case, the instructions for plaintiff fail to cover the question of nominal damages, upon which the third instruction for the defendant is based. The instructions for plaintiff and defendant should always be

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construed together, and, when so considered, should correctly announce the law, and constitute one harmonious whole.

The refusal of the seventh instruction for plaintiff was correct. The facts disclosed in no view authorized the infliction of punitive damages.

The case is affirmed on cross-appeal, and on direct appeal reversed and remanded.

INTERSTATE COMMERCE COMMISSION *v.* CINCINNATI, P. & V. R. Co. *et al.*

(Circuit Court, E. D. North Carolina, August 10, 1903.)

[124 Fed. Rep. 624.]

Carriers—Interstate Commerce Law—Undue Preference in Rates between Localities.*

Conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory," as to create a very active competition on shipments from the West, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis, and East St. Louis by a material reduction from local tariff rates by the connecting lines west of the Ohio river, while substantially the local rates are charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory, but in the southern territory, and has fewer lines of transportation, and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice or disadvantage, in violation of section 3 of the act to regulate commerce (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

In Equity. Suit by the Interstate Commerce Commission to enforce an order in respect to rates charged by defendant railroad companies.

L. A. Shaver and Harry Shinner, U. S. Atty., for complainant.

Ed. Baxter, for respondents.

*As to the right, under the interstate commerce act, to discriminate with respect to freight rates, between localities where conditions are dissimilar, see *Interstate Commerce Commission v. Nashville, C. & St. L. R. Co.* (C. C. A.), 7 R. R. R. 874, 30 Am. & Eng. R. Cas., N. S., 874; notes, 13 Am. & Eng. R. Cas., N. S., 313; *Behlmer v. Louisville & N. R. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 620; *Detroit, etc., R. Co. v. Interstate Commerce Commission* (U. S.), 5 Am. & Eng. R. Cas., N. S., 702; *Tex. Pac. Ry. Co. v. Interstate Commerce Commission* (U. S.), 5 Am. & Eng. R. Cas., N. S., 87; *Interstate Commerce Commission v. Alabama Midland R. Co.* (C. C. A.), 3 Am. & Eng. R. Cas., N. S., 638; *Interstate Commerce Commission v. Western & A. R. Co.* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 298; *Detroit, etc., R. Co. v. Interstate Commerce Commission* (U. S.), 5 Am. & Eng. R. Cas., N. S., 700 (difference in population and traffic); *East Tennessee V. & G. Ry. Co. v. Interstate Commerce Com.* (U. S.), 20 Am. & Eng. R. Cas., N. S., 729.

Interstate Commerce Commission v. Cincinnati, etc., R. Co .

PURNELL, District Judge. The bill herein by the Interstate Commerce Commission under section 16 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) seeks the enforcement of an order of the commission against the Cincinnati, Portsmouth & Virginia Railroad Company and other carriers. The order was the outcome of a complaint to the commission under section 13 of the act to regulate commerce (24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]), made by the Wilmington Tariff Association, incorporated under the laws of the state of North Carolina. Defendant carriers constitute through lines of transportation and transport traffic under joint through rates from Chicago, St. Louis, East St. Louis, Cincinnati, and Louisville to Norfolk, Richmond, and other Virginia cities, and also to Wilmington, N. C., and the complaint of the Wilmington Tariff Association to the commission charged: First, the rates of the defendants for the transportation of traffic from said cities to Wilmington were unreasonable in themselves, in violation of section 1 of the law (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which requires all rates charged to be just and reasonable; and, secondly, that the rates to Wilmington, taken in connection with the rates from the same cities to Norfolk, Richmond, and other Virginia cities, subject "merchants and dealers at Wilmington, their traffic, and the city of Wilmington" to undue or unreasonable prejudice or disadvantage, and give the merchants or dealers of Norfolk, Richmond, and other Virginia cities an undue or unreasonable preference or advantage over merchants and dealers of Wilmington, in violation of section 3 of the act to regulate commerce (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]). The commission found that the rates in question were unduly prejudicial to Wilmington, and unduly preferential to Norfolk, Richmond, and Virginia cities, and in pursuance of such finding issued the order for the enforcement of which this proceeding was instituted. The order forbids the continuance of the alleged undue prejudice to Wilmington and undue preference to Norfolk, Richmond, and other Virginia cities. The defendants refused to obey the order, and thereupon the commission instituted this proceeding for its enforcement under section 16 of the act to regulate commerce (24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]).

The bill alleges the due issuance of the order, its service upon the defendants, and their refusal to obey. It further alleges all the proceedings before the commission leading up to the order, and attaches as exhibits the complaint, the answers of the carriers thereto, and the order. After making these allegations, the bill charges that the rates to Wilmington and to Norfolk subject Wilmington to an undue prejudice, and give Norfolk an undue preference over Wilmington, in violation of the law, on the facts as found by the commission

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and alleged in its bill. The issue presented is under section 3, which is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The complaint of the Wilmington Tariff Association related to the rates from Cincinnati and Louisville, as well as from St. Louis, East St. Louis, and Chicago; but the commission found that the rates from Cincinnati and Louisville were not unreasonable, but only the rates from St. Louis, East St. Louis, and Chicago were unlawful, and the order of the commission relates only to those rates. Norfolk and Wilmington are both seaports, and it is conceded there is no material difference in the distance from the shipping points from Chicago and East St. Louis to Norfolk and to Wilmington, respectively, via the short line to Norfolk, being 40 miles less, and from East St. Louis 30 miles more, than to Wilmington. In short, all the facts seem to be conceded, as are the rates and differences; the only contention being, are these rates such as are inhibited, unduly prejudicial to Wilmington, and unduly preferential to Norfolk, Richmond, and other Virginia cities and stations? The rates from St. Louis and East St. Louis being practically the same, it is unnecessary to speak of both, and the one may be understood to include the other. The rates from Cincinnati and Louisville to Wilmington are found by the commission to be in excess of the rates to Norfolk and Richmond on 100 pounds first class 20 cents, second class 14 cents, etc., or, on car-load lots of 40,000 pounds, \$80 first class; \$58 second class; \$50 third class; \$44 fourth class; \$36 fifth class; \$26 sixth class; flour in sacks, \$32; flour in barrels, \$60; packing house products, \$4; grain, \$22. But these rates, as found by the commission, are not such as are prohibited, and no rates not in excess of 135 per cent. of the Norfolk rates are deemed or held to be unlawful. The excess under-rates from Chicago are as follows: On 100 pounds first class, 50 cents; second class, 40 cents; third class, 31 cents; fourth class, 26 cents; fifth class, 20 cents; sixth class, 15 cents; flour in sacks, 15.5 cents; flour in barrels, 29 cents; hay, 5.5 cents; grain, 18 cents. Or, on car-load lots of 40,000 pounds, first class, \$200; second class, \$160; third class, \$124; fourth class, \$104; fifth class, \$80; flour in sacks, \$62; flour in barrels, \$116; grain, \$72; hay, \$22. Excess on rates from East St. Louis, excess of Wilmington rates per 100 pounds: First class, 36 cents; second class, 28.5 cents; third class, 23 cents; fourth class, 20.5 cents; fifth

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class, 15 cents; sixth class, 11 cents; flour in sacks, 12.5 cents; flour in barrels, 23 cents; grain, 8 cents; hay, 6.5 cents. Excesses of Wilmington rates per car-load lot of 40,000 pounds: First class, \$144; second class, \$114; third class, \$92; fourth class, \$82; fifth class, \$60; sixth class, \$44; flour in sacks, \$50; flour in barrels, \$92; grain, \$32; hay, \$26. The table of tariff rates from which these excesses appear are set out in the bill and exhibits attached, the correctness of which is not denied, but admitted.

The commission, in effect, finds the rates to Wilmington should exceed the rates to Norfolk, Richmond, and other Virginia cities, but say they should not do so by more than 135 per cent. The rates to Norfolk, Richmond, and other Virginia cities are fixed—set forth in the bill and exhibits—and there is no suggestion these rates should be increased. It would be a simple calculation to determine what 135 per cent. of these rates would be under this rule, or what they should not exceed. The old rule of three would settle this. This is fixing the maximum rates, which the commission cannot do under the statute; hence the last section of the order is unauthorized. Fixing freight rates is a complex science, requiring a trained mind—a specialist experienced in the business. The Interstate Commerce Commission is created as an expert body, not, however, vested with authority to fix rates, maximum or minimum. This is conceded in the argument, as it is that the commission has no power to say what proportion each carrier of a through line shall receive of a through rate; but it is contended that the order relates to the through rate as an entirety, and as to this the commission may dissect a through rate, and consider the proportion received by one carrier of the line, and if it finds that the proportion received by it is its local rate, fixed for a strictly local haul, vitiate the entire rate. As the commission finds the rates from Cincinnati and Louisville are not unlawful, unduly prejudicial, and preferential, the rates found to be unduly prejudicial and preferential, therefore, must necessarily be between these points on the Ohio river and St. Louis, East St. Louis, and Chicago. Conceding the contention above referred to, without, however, deciding it, as it is not deemed essential, the rates found to be unduly prejudicial and preferential are on lines in a territory north of the Ohio river, where there is great competition, and circumstances which tend to fix rates govern freight tariffs. This question, asked during the argument, for a better understanding of the facts, seemed to surprise counsel, but it is apparent from the record, the table, etc., as being the important and essential question in this proceeding. In short, the carriers connecting these points charge their local tariff rates as a part of the through rates to Wilmington, but not to Richmond, Norfolk, and Virginia points, and this when the traffic is carried over the same lines, possibly in the same cars. Is there any valid

reason under the law for this difference? These lines are in a highly competitive territory, where the trunk line rates obtain, fixed by competition with the waterway via the lakes, for all lines which serve the great eastern ports on the Atlantic seaboard—Boston, New York, Philadelphia, and Baltimore. That these rates are so fixed and highly competitive is too well recognized and has been too often sustained to require a citation of the numerous authorities to this effect. It is so. These rates, for reasons satisfactory—among others, the numerous steamship lines from Richmond and Norfolk, the competing railroads, and the water transportation from Baltimore to Norfolk or Richmond—have been extended to these points from the West. Wilmington is supplied by branch lines of two railroad systems, the Atlantic Coast Line and the Seaboard Air Line systems, and one weekly line (the Clyde) of steamers to and from New York. These rates have not yet been extended to Wilmington. The one—Norfolk, Richmond, and other points in Virginia—are in what is known as the trunk line territory, while Wilmington is not, but is in southern territory, where the competition for freight is not so active. The rates from Cincinnati and Louisville are found not to be unjustly prejudicial and preferential, though much higher, as shown in the records. It is said freight can be shipped by rail from Chicago, St. Louis, and East St. Louis to New York, thence by steamer to Wilmington, cheaper than it can by rail. But the commission was not asked to remedy this. The remedy is plain; let the freight be so shipped; and this court is not called upon to consider this question. The only effect it can have in this proceeding, as may be said of many suggestions of this character in the argument, is to prove the active competition within, and the absence of such active competition without, the trunk line territory. Wilmington has two systems of railroads without western termini—i. e., they do not connect directly with the territory west of the Ohio river—and one weekly line of steamers to New York. Norfolk has several systems of railroads extending in the direction of and connections to the point where the undue prejudice and preference originates and exists, with several lines of steamers to Baltimore, Philadelphia, New York, and Boston, some of them daily. If competition controls rates—and there is no contention that it should not and does not—Norfolk and Richmond are territorially located to be entitled to trunk line rates which have been extended to that territory. *Interstate Commerce Commission v. Railway Co.*, 168 U. S. 145, 18 Sup. Ct. 45, 42 L. Ed. 414. This trunk line rate is not shown to have been extended to Norfolk and Richmond from any disposition to favor these points or prejudice Wilmington, but on account of the competition referred to, and the construction put upon the long and short haul clause of the act to regulate commerce of 1898, and since insisted on by the

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Chesapeake & Ohio Railway Company, the lines of which extend from Newport News, on the same harbor as Norfolk, in a commercial sense one and the same with Norfolk, insight, connected with the ocean by the same inlet, etc., virtually the same for the purposes of commerce, to the Ohio river in the territory where the evil complained of exists, if it exists at all in a legal sense.

At both ends of the through lines, then, there is sharp, active, legitimate competition—at Norfolk meaning the termini of all railroad routes to the harbor, for it can make no material difference on which side of the harbor, Chesapeake Bay or Elizabeth river, the terminal station of a railroad system is located, all being deep-water terminals and shipping stations; and at Chicago, St. Louis, and East St. Louis. On the other hand, the competition at Wilmington, with one line of steamers and two systems of railroad, is not near so great, active, and sharp. If the rule established by the courts in the case cited and others, concluding with *E. T., V. & G. R. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719, be applied, there are sufficient reasons for dissimilarity in rates, as said in the decision just cited. The court in the case *supra*, sections 1 and 2 of the syllabus in 181 U. S., says:

“Although the Interstate Commerce Commission found as a fact that the competition at Nashville, which forms the basis of the contention in this case, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to make the lesser charge for the longer haul; but since that ruling of the commission was made it has been settled by this court in *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648 [20 Sup. Ct. 209, 44 L. Ed. 309], and other cases cited, that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that, where this condition exists, a carrier has a right of his own motion to take it into view in fixing rates to the competitive point; and it follows that the construction affixed by the commission to the statute upon which its entire action in this case was predicated was wrong. The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place; and this right is not destroyed by

the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it."

The rule cited above applies with equal force to Richmond, with several systems of railroads and steamship lines, though water competition may not be so active.

The various other points—"other cities in Virginia"—do not require to be specifically considered, as they are not subjects of the complaint, only figure in the proceeding incidentally; and, the rates to the termini, Norfolk and Richmond, being fixed in conformity with the law, rates to these intermediate points would be probably controlled by the long and short distance haul rule (section 4 of the act to regulate commerce, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), as construed by the Interstate Commerce Commission and the courts. Rates to these points are used (as are different points in North Carolina to which rates are much higher) in the discussion as illustrations and argument, but the question presented for decision is under section 3, and not under the long and short haul clause (section 4). It will be in apt time to consider this phase when a proceeding is instituted presenting this question. To pass upon these rates now would be aliunde the record, and not germane to the question presented.

Having seen how the rates to Richmond and Norfolk are fixed, and that they are in accordance with the rule laid down by the Supreme Court, there being no complaint that these rates are too low, or should be increased, it is in order to inquire how the Wilmington rates are fixed. The rates to Wilmington are the through rates to Norfolk and Richmond plus the combination or competing rates of two railroads, the Atlantic Coast Line and the Seaboard Air Line and the waterway via the Atlantic Ocean and the Cape Fear river. These rates, for these reasons, because they are combination and competitive rates, are less than to any other point in North Carolina; Wilmington being outside the trunk line territory (as said, in "Southern territory," where trunk line rates do not obtain), but having two systems of railroads and water transportation—about 30 miles from the ocean via Cape Fear river. On this waterway it is said rates are higher than they would be naturally on account of the stringent laws and high charges for pilotage to and from the bar, and for other incidental expenses. One regular line of steamers and such tramp steamships or other vessels which come irregularly to bring or get special cargoes cannot create such active competition as exists at Norfolk, or even at Richmond. Why, it is not essential to discuss. It does not. The absence of competition causes the differences. Competition fixes freight rates, as it gives life to commerce. The commission finds that "the carrier is north of the Ohio river, by

accepting less than their local charges on the traffic destined to Norfolk and Richmond and enforcing greatly higher charges, amounting in most instances to their local rates, for identically the same service, are largely responsible for this resulting discrimination against Wilmington; but it is not found that such carriers are altogether in fault. The rates south of Norfolk and Richmond on this traffic are also upon a high basis." And this seems to be a location of the discrimination, as before seen, and the only subject of complaint. As pointed out, the territory north and west of the Ohio river is in a sharply contested section for freights—in the "trunk line" territory, which has been extended to include Norfolk and Richmond, with their several competing carriers by rail and water—a geographic traffic and commercial advantage which Wilmington does not enjoy. The one favored more by natural and artificial (constructed) lines of traffic; both enjoying in proportion thereto their advantages over other points and cities having no water transportation or served by fewer lines of railroad. Courts and commissions must and do recognize these differences, as do carriers in fixing their freight rates. This court is not inadvertent to the rule as laid down by the Supreme Court in *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, that "the construction given to the statute by those charged with the duty of executing it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"; but the court is no less inadvertent to the rule laid down by the same authority to the effect that, when the government goes into one of its courts, it is entitled to no more consideration than any other litigant; and the fact that the statute requires proceedings of this character to be instituted in the courts for the purpose of enforcing the orders of the honorable Interstate Commerce Commission puts on the court an original, independent responsibility to due inquiry make, exercise its own judgment, and decide causes as they arise or are instituted. To issue the writ provided for in the act the court must be satisfied a case has been made out as for any other litigant in a court of equity. Recognizing the complainant herein as a co-ordinate branch of the government, created as an expert body for specific purposes, and with due deference for that honorable body, for reasons stated, and others not necessary to set out at length, this court is not satisfied there are not "cogent" reasons for a difference of opinion as to the rates discussed being unduly prejudicial to Wilmington and unduly preferential to Norfolk and Richmond and other Virginia cities. Personal and local attachments would incline this court to hold otherwise, but personal feelings, prejudices, or attachments should have no place in the discharge of official duty—judicial, executive, or legislative—though they do in many instances have a potent influence; in some instances for good, frequently for evil. The reasons set out in the sev-

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eral pleadings and exhibits in the argument, and incidentally hereinbefore referred to, seem to be "cogent" reasons for the difference in traffic rates referred to, and for denying the writ asked for in the bill to enforce the order of the Interstate Commerce Commission. It is therefore considered, ordered, and decreed that the prayers of the bill numbered 5, 6, and 7, as follows:

"(5) That upon the final hearing hereof a decree may be entered granting to complainant a writ of injunction, or other proper process, mandatory or otherwise, to restrain the said defendants, and each of them, and their respective officers, servants, agents, from further continuing in their violation of and disobedience of the said order of commission.

"(6) That a decree may be entered requiring the said defendants, and each of them, to pay such sum of money, not exceeding the sum \$500 for each day after a day to be named in such decree, that they shall respectively fail to obey the said injunction or other proper process.

"(7) That a decree may be entered requiring the said defendants to pay the costs of this proceeding and reasonable counsel fees,"

—Be, and the same are hereby, denied, and the bill herein be, and the same is, dismissed, with cost.

ALABAMA GREAT SOUTHERN R. CO. v. CLARK.

(*Supreme Court of Alabama, Feb. 28, 1903.*)

[34 So. Rep. 917.]

Fires Set by Locomotives—Contributory Negligence—Assumption of Risk—Pleading.

In an action to recover damages for the alleged burning of plaintiff's cotton, stored in a warehouse along defendant's right of way, special pleas, alleging contributory negligence and assumption of risk, in that a part of the warehouse in which the cotton was stored consisted of an unenclosed platform near defendant's track, on which cotton was stored to plaintiff's knowledge, and was liable to and did become ignited and communicated the fire to the cotton in the warehouse, etc., were not unnecessarily prolix, irrelevant, or frivolous, and were therefore not subject to a general motion to strike under Code 1896, § 3286.

Same—Negligence—Pleading.

In an action for loss of cotton by fire, counts of the complaint alleging that defendant negligently set the fire were not demurrable for failure to allege in what the negligence consisted.

Same—Defenses.

In an action for the destruction of cotton by fire, alleged to have been communicated by defendant's engine, the fact that plaintiff held an equitable title only to a part of the cotton sued for was immaterial.

Same—Destruction of Goods in Warehouse—Right of Action.

Cotton was purchased for plaintiff with his funds by plaintiff's agent, and delivered by the agent to a warehouse. Warehouse receipts were issued to the agent, which were delivered by him to plaintiff without indorsement: *held*, that the title to the cotton vested

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in plaintiff at the time of purchase by his agent, which was not divested so as to deprive plaintiff of the right to sue for its negligent destruction by the agent's act in storing it and taking receipts in his own name.

Warehouse Receipts.

Where warehouse receipts for cotton alleged to have been negligently destroyed were issued and signed in the name of the warehouseman by another under the warehouseman's personal supervision at the time the cotton represented by them was weighed and received, they were admissible in evidence to show title in the person to whom the receipts were issued, regardless of the fact that they were not signed by the warehouseman.

Fires Set by Locomotive—Negligence—Evidence.

In an action for the destruction of cotton stored in a warehouse adjoining defendant's railroad track by fire communicated by sparks from defendant's engine, evidence showing the volume of sparks emitted by such engine, and the height to which such sparks were thrown, while the engine was switching cars near the warehouse at or about the time the fire occurred, was admissible.

Same—Same—Evidence of Other Fires.*

Evidence as to other fires caused by the emission of sparks from the same engine at the same place, and very recently after the fire complained of occurred, in the damaged cotton left on the ground, in connection with evidence that other engines passed and repassed the same place without setting the cotton on fire, was competent in rebuttal of the evidence of defendant's witnesses that on examination they found the spark arrester and other parts of the engine alleged to have set the fire in good condition.

Same—Same—Rules—Degree of Care.†

In an action for destruction of cotton by fire set by defendant's engine, a rule adopted by defendant for the government of its employees, requiring the exercise of "every" precaution to guard against the setting out of fire, was inadmissible; defendant's liability being limited to the exercise of ordinary care.

Appeal from Circuit Court, Greene County; S. H. Spratt, Judge.

Action by J. P. Clark against the Alabama Great Southern Railroad Company to recover damages for the alleged destruction by fire of 114 bales of cotton located in a warehouse near the railroad right of way. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The complaint, as originally filed, contained three counts to recover \$6,500 damages. To each of these counts the defendant pleaded the general issue and five special pleas. In four of these special pleas the defendant set up contributory negligence on the part of the plaintiff or its agent, averring that before the time of the fire the plaintiff had put the cotton, for the burning of which the present suit was brought,

*Warehouseman's liability for damages from fires, see notes, 13 Am. & Eng. R. Cas., N. S., 92, 258; 15 Am. & Eng. R. Cas., N. S., 498; 17 Am. & Eng. R. Cas., N. S., 397; Backhaus v. Chicago & N. W. R. Co. (Wis.), 3 Am. & Eng. R. Cas., N. S., 426; Walker v. Eikleberry (Okla.), 13 Am. & Eng. R. Cas., N. S., 253; Berry v. West Virginia & P. R. Co. (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103.

†As to the admissibility of evidence of other fires set by defendant's locomotives, see preceding case and foot-note.

in the warehouse of the Planters' Warehouse & Commission Company for safe-keeping; that adjoining and as constituting a part of said warehouse there was an unenclosed platform, which was used by said warehouse company for receiving cotton; that this warehouse and platform were situated on the side of defendant's road; that by reason of its location the unenclosed platform adjoining said warehouse was not a reasonably safe place for the storage of cotton, in that there was constant danger of cotton on the platform becoming ignited by sparks emitted from the defendant's engines while passing along by the side of said platform; that the fact of this danger and of said platform not being a reasonably safe place for the storage of cotton was known to the plaintiff and his agents, the warehouse people; that notwithstanding these facts the plaintiff's agent, the warehouse company, allowed or permitted a lot of cotton to be placed on said unenclosed platform, and negligently failed to remove the same, and negligently allowed the same to remain on the platform, and that while so remaining on said platform a part of said cotton was ignited by sparks emitted from defendant's locomotives; and that the fire was communicated to the cotton on said unenclosed platform, and was communicated to other cotton in the warehouse, including plaintiff's cotton, which was destroyed. The remaining special plea averred the facts above set out, and then averred that the plaintiff, or his agent, the said warehouse company, with knowledge of such facts, and notwithstanding the warning on the part of the defendant of the danger incident thereto, placed said cotton on the unenclosed platform, and that, by reason of such conduct on the part of the plaintiff or his agent, the plaintiff voluntarily and knowingly assumed the risk of injury by fire communicated by defendant's engines.

The plaintiff, by separate motions, moved the court to strike from the file each of the defendant's said special pleas; each of said motions to strike being general, and no grounds being stated therefor. The court sustained each of the motions to strike the defendant's special pleas. To such ruling of the court the defendant separately excepted. Thereafter the plaintiff, by leave of the court, amended his complaint by adding two counts, as follows:

"(4) The plaintiff claims of the defendant the further sum of \$6,500 as damages, for that heretofore on, to wit, the 14th day of March, 1901, the defendant negligently set fire to and destroyed, to wit, 114 bales of cotton, the property of the plaintiff, or in which the plaintiff held the equitable or beneficial interest, located on the premises of the Planters' Warehouse & Commission Company, in the town of Eutaw, Alabama, of the value of, to wit, \$5,000, to plaintiff's great damage as aforesaid.

"(5) The plaintiff claims of the defendant the further sum of \$6,500 as damages, for that on, to wit, the 14th day of

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March, 1901, the defendant was engaged in running or operating a steam engine or locomotive on defendant's track in Greene county, Alabama, and that the plaintiff owned, or held the equitable or beneficial interest in, to wit, 114 bales of cotton, which said cotton was stored in the warehouse of the Planters' Warehouse & Commission Company at Eutaw, Alabama, and which cotton was damaged or destroyed by fire, which fire was communicated to certain bales of cotton which were on the platform adjoining said warehouse, by sparks from the engine or locomotive operated by defendant, and spread therefrom into said warehouse; and plaintiff alleges that said fire was communicated to said cotton upon the platform of said warehouse through negligence of the defendant. Plaintiff avers that said cotton was of the value of, to wit, \$5,000, and that by reason of said fire the plaintiff was injured as aforesaid."

To the fourth and fifth counts of the complaint so added by amendment, the defendant separately demurred upon the following grounds: "(1) For that said count fails to allege or show what duty the defendant owed to the plaintiff in the premises; (2) for that said count is indefinite and uncertain, in that it fails to show this defendant wherein the defendant was guilty of any negligence; (3) for that the negligence in said count is stated merely as a conclusion of the pleader; (4) for that said count is a departure from the original suit, in that it seeks to recover of this defendant for or on account of some beneficial interest in the cotton alleged to have been burned; (5) for that said count is indefinite and uncertain, in that it fails to allege or show what beneficial interest the plaintiff had or claimed in the cotton alleged to have been burned; (6) for that said count is indefinite and uncertain, in that it fails to allege or show to this defendant whether plaintiff claims damages by reason of the destruction of cotton which belonged to this plaintiff, or by reason of the destruction of cotton which plaintiff had a beneficial or equitable interest in; (7) for that said count seeks to recover of this defendant for the destruction of cotton of which he was not the owner, or to which he did not have the legal title or interest." The court overruled each of the demurrers as interposed separately to the fourth and fifth counts of the complaint, and to each of these rulings the defendant separately excepted. Thereupon the defendant filed the same pleas to the complaint as amended as were filed to the original complaint. The plaintiff moved to strike from the file the several pleas filed to the complaint as amended, the court sustained each of these motions, and to each of such rulings the defendant separately excepted.

On the trial of the cause the evidence showed the following facts: The 114 bales of cotton, for the burning of which the present suit was brought, were owned by plaintiff, and were stored in the warehouse of the Planters' Warehouse & Com-

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mission Company at Eutaw. Fifty-four of these bales of cotton were evidenced by receipts made out to the plaintiff himself or indorsed to him, and 60 of said bales of cotton were evidenced by warehouse receipts made out to parties other than plaintiff, which receipts were in the plaintiff's possession, but had not been indorsed by any one. The warehouse where this cotton was stored was built on the side of the track of the defendant, and very near thereto. There were bales of cotton piled all along the uncovered platform. A short time prior to the discovery of fire in said cotton, a freight train operated on the defendant's road came to Eutaw, and the crew of said train was engaged in switching cars along the tracks of the defendant's road at Eutaw. The day was dry and hot, and the wind was blowing hard in the direction from the railroad track towards the warehouse. A very few minutes after the engine, while engaged in switching cars, had passed the warehouse where said cotton was stored, it was discovered that the cotton on the uncovered part of the platform adjoining the warehouse was on fire. From this engine fire was communicated to other cotton in the warehouse, and in the fire 114 bales of cotton owned by the plaintiff were destroyed. The evidence for the plaintiff tended to show that, during the switching of the cars along by the side of and near to the warehouse where his cotton was stored, there was an unusual quantity of sparks emitted by the defendant's engine; that these sparks were of unusual size; that the fireman was operating the engine, and not the engineer; and that the engine was run at a greater rate of speed than was customary. The evidence for the defendant tended to show that the engineer operated the engine, and did so in a careful manner; that he was a competent engineer; and that the engine was equipped with spark arresters and other devices similar to those in use upon well-regulated railroads, and that the engine was in good condition.

The warehouse receipts evidencing the cotton owned by the plaintiff, and which was burned, were introduced in evidence. The defendant objected to the introduction in evidence of these warehouse receipts, which were issued to other persons than the plaintiff, and which were not indorsed. The court overruled the objection, and the defendant duly excepted. It was shown by the evidence that some of the warehouse receipts held by the plaintiff were not signed by the warehouseman himself, but that his name was signed thereto by other parties. It was shown, however, that, when said warehouse receipts were signed and issued by other parties in the name of the warehousemen, they were so signed and issued under the personal supervision of the warehousemen, and at the time the cotton represented by them was weighed and received by the warehousemen and was stored in the warehouse. The defendant objected to the introduction in evidence of the warehouse receipts to which the name

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of the warehouse was signed by other parties. The court overruled the objection, and the defendant duly excepted.

Several of the witnesses introduced for the plaintiff testified that they noticed an unusually large volume of sparks emitted by the defendant's engine while it was switching cars just before the fire broke out in the cotton, that these sparks ascended to a height of 25 or 30 feet above the engine, and that said sparks were of unusual size. Upon one of said witnesses testifying that just before the fire, when the engine went by the depot, which was a short distance from the warehouse, it was going very fast, and that he (the witness) could hear the sparks fall on the tin roof. The defendant moved to exclude the evidence of the witness with reference to the sparks falling on the top of the roof, on the ground that it was illegal and irrelevant, and upon the further ground that the depot was across the track from the warehouse, and not immediately near it. The court overruled this motion, and the defendant duly excepted.

During the examination of one of the witnesses, who testified that while the fire was in progress he saw the engine which had been switching the cars on the track of the defendant near the fire, and that his attention was called to it as it was running by, he was asked the following question: "What did you observe as to the emission of sparks at that time?" The defendant objected to this question upon the grounds that it called for irrelevant and illegal evidence, and that it was shown by the evidence that the fire had already caught and was in progress at the time. The court overruled the objection, and the defendant duly excepted. The witness answered that he noticed a great many sparks emitted by the engine; that the sparks were of large size, and were thrown 25 or 30 feet above the smokestack.

During the examination of two witnesses for the plaintiff, each of them testified, against the objection and exception of the defendant, that some weeks after the cotton was burned, and while the injured cotton was spread out on the ground not very far from the tracks of the defendant, for the purpose of cleaning it and picking out the uninjured portion of the cotton, such cotton was fired two or three times by the sparks emitted from the same engine from which they were emitted when the cotton involved in this suit was burned at the warehouse.

During the cross-examination of the engineer who was in charge of the engine which emitted the sparks that caused the burning of the cotton in question, and after he had testified as to the duties of engineers in operating engines under the rules and regulations of the defendant, he was asked the following question: "Are not they required to refrain from using steam, and enjoined to use it as lightly as possible, and not allow their fires to be disturbed, in passing cotton platforms, and when their trains carry cotton exposed?" The

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court overruled the defendant's objection to this question, to which ruling the defendant duly excepted and the witness answered that they were.

During the examination of the master mechanic of the defendant's road, and after he had identified the rule book of the defendant company, the plaintiff introduced said book in evidence. The defendant objected, and duly excepted to the court's permitting rule 560 to be introduced, upon the ground that it was incompetent, irrelevant, and immaterial. This rule 560 was in words and figures as follows: "Rule 560. They must use every precaution to prevent the setting of fires by their engines. They must see that the netting, spark arresters, and ash pans are in good order. They must refrain from using steam, or use it as lightly as possible, and not allow their fires to be disturbed in passing cotton platforms, other trains carrying exposed cotton, and in passing close to wood piles, lumber piles, and wooden structures. They must observe these precautions, and also keep their dampers closed and not allow the grates to be shaken while passing over wooden bridges and trestles. They must not allow burning coal, wood waste, or hot cinders to be dropped from the engine while in motion; and must keep the rear damper closed while running the engine forward, and the front damper closed while running it backward."

Among the several written charges requested by the defendant, to the refusal to give each of which it separately excepted, was the following: "(32) The court charges the jury that as to the 60 bales of cotton brought by Ward & Dunlap, the warehouse receipts for which are in the possession of plaintiff, unindorsed, the jury must find a verdict for the defendant."

There were verdict and judgment for the plaintiff, assessing his damages at \$4,977.64. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

A. G. & E. D. Smith, for appellant.

Vande Graaff & Verner, J. P. McQueen, and Harwood & McKinley for appellee.

DOWDELL, J. The sufficiency of a plea in law should be tested by demurrer, and not by a motion to strike. Were it otherwise, a motion would be made to take the place of a general demurrer, which has been abolished in pleading by statute (section 3303, Code 1896), and, furthermore, such practice would leave no office to be performed by a special demurrer in pleading, as is contemplated in the above statute. Section 3286 provides for a motion to strike where the pleading is "unnecessarily prolix," "irrelevant," "or frivolous." The motion to strike in the present case was general, no ground being stated; nor, as for that matter, is it necessary to state the grounds of a motion to strike, where motion is the

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proper remedy. It cannot be said that the pleas which were stricken, were either unnecessarily prolix or irrelevant or frivolous. If the facts stated in these pleas were insufficient in law to constitute a valid defense to the action, it was the office of a special demurrer to point out the defect, and, by so doing, inform the pleader wherein the insufficiency existed, thereby affording an opportunity of amendment, if susceptible of amendment. The circuit court erred in sustaining the motion to strike. *Troy Fertilizer Co. v. State of Alabama* (Ala.) 32 South. 618; *Brooks v. Continental Ins. Co.*, 125 Ala. 615, 29 South. 13; *Murphy v. Farley*, 124 Ala. 279, 27 South. 442; *Williamson v. Mayer*, 117 Ala. 253, 23 South. 3.

There was no error in the court's ruling on the demurrer to the fourth and fifth counts, which were added by way of amendment to the complaint. The first three grounds of the demurrer raise the question of the sufficiency of the averment as to negligence in these counts. This question has been recently determined by this court, and adversely to the contention of the appellant. *L. & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438. The other grounds of demurrer are also untenable. The gist of the action is the negligent burning by the defendant of the cotton; and whether the plaintiff's title to the cotton is an equitable or legal title is unimportant, as in either case the right and cause of action would be the same. Of the cotton destroyed, 60 bales were purchased for the plaintiff by a third party with money furnished by the plaintiff for the purpose. The warehouse receipts for these 60 bales were issued in the name of such third party, and by him delivered to the plaintiff, but without indorsement. The legal title to this cotton vested in the plaintiff at the time his agent purchased the same and paid for it with plaintiff's money, and the storing of it in the warehouse and taking the receipts in the agent's name did not operate a divestiture of the legal title out of plaintiff. *Weil v. Ponder*, 127 Ala. 296, 28 South. 656. There was no merit in the objection to the admission of these receipts in evidence upon the theory that they showed the legal title to the cotton to be in another than the plaintiff. Nor was there any error in admitting in evidence the warehouse receipts, to which the name of the warehouseman was signed by another party. These receipts were signed and issued under the personal supervision of the warehousemen, and at the time the cotton represented by them was weighed and received.

It was clearly competent to show the volume of sparks emitted by the defendant's engine, and the height to which such sparks were thrown, while switching cars near to and by the warehouse, at or about the time the fire occurred. *A. G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 South. 771; *L. & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438.

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The evidence as to other fires caused by the emission of sparks from this particular engine at the same place, and so recently after the fire complained of, in the damaged cotton left on the ground, in connection with the evidence that other engines passed and repassed the same place without setting the cotton on fire, was relevant and competent in rebuttal of the testimony of the defendant's witnesses as to the condition in which they found the spark arrester and other parts of the engine upon their examination after the fire.

There existed no contractual relations between the plaintiff and the defendant, and the degree of care in the operation of the engine in order to prevent the destruction of plaintiff's property by the emission of sparks from the defendant's engine was that of an ordinarily prudent man. By this rule of law, and not by any rules of the defendant company regulating the conduct of its agents or employees in the operation of its engines, must the question of negligence be determined. By rules adopted for the government of its employees in the management of its internal business, the defendant company could not lessen the degree of care which the law requires, and it would be unreasonable to hold the defendant to a higher degree of care than the law imposes, because in its rules, in order to more thoroughly guard against accidents, it exacted an unusual or extraordinary degree of care of its employees. The rule of the company introduced in evidence over the objection of defendant, and which was made for the government of its employees, required the exercise of a greater degree of care than that of an ordinarily prudent man; it required the exercise of every precaution. This evidence was not without prejudice to the defendant, and its admission was error.

Of the several written charges refused to the defendant, only one, the thirty-second, is insisted on in argument. This charge involves a proposition of law, relative to the 60 bales of cotton purchased by plaintiff's agent, and which we have already considered, and it follows, from what we have said, that the court properly refused the charge.

For the errors pointed out, the judgment of the circuit court will be reversed, and the cause remanded.

SCHLICHTING *v.* CHICAGO, R. I. & P. Ry. Co.

(*Supreme Court of Iowa, Oct. 23, 1903.*)

[96 N. W. Rep. 959.]

Possession of Bill of Lading—Estoppel.

A shipper of goods, who informed the connecting carrier that he held bills of lading for the goods, was estopped from disputing the fact.

Freight—Right to Deliver without Production of Evidence of Ownership.

Where no bills of lading are issued, the carrier is justified in deliver-

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ering the goods to the consignee without the production of receipts or other evidences of ownership issued to the consignor.

Carriage of Freight—Delay Caused by Shipper Requiring Production of Bill of Lading.

A shipper of goods telegraphed to the connecting carrier that he held the bills of lading, and that no delivery should be made until bills of lading were surrendered. The carrier thereupon refused to deliver the goods. Subsequently the shipper wrote a letter, addressed to the connecting carrier, recalling the order in the telegram, and directing a delivery without the bills of lading. The consignee presented the letter to the carrier at its office at the place of destination, but the carrier refused to deliver because the bills of lading were not produced, but delivered them on production of the freight receipts: *held*, that the carrier was justified in refusing to deliver, and therefore not liable to the shipper for the damage to the goods caused by the delay in the delivery.

Appeal from District Court, Linn County; William G. Thompson, Judge.

Action at law to recover damages resulting from defendant's failure to promptly deliver certain shipments of eggs. The trial court directed a verdict for the defendant, and plaintiff appeals. Affirmed.

L. P. Main, for appellant.

Carroll Wright, for appellee.

DEEMER, J. In July of the year 1899 various parties living on the line of the Burlington, Cedar Rapids & Northern Railway Company delivered to said company numerous cases of eggs consigned to O. C. Knispel & Co. and Knispel & Lenhart, Chicago, Ill. This freight was delivered by the Burlington & Cedar Rapids Company to the defendant company at West Liberty, Iowa, for shipment to Chicago. Shipping receipts were issued by the Burlington Company, which recited that the goods were marked in the names of the aforesaid consignees. In due course the goods arrived in Chicago, and while yet in the possession of the defendant plaintiff sent it a telegram which read as follows: "Cedar Rapids, Iowa, July 9th, 1899. J. H. Norris, C. R. I. & P. Ry. Co., Chicago, Ill.: I hold bills of lading for eggs arriving to-day from B. C. R. & N. points consigned to O. C. Knispel and Co., and Knispel and Lenhart, Chicago. Do not make delivery until bills of lading are surrendered. I will be there Monday. Henry Schlichting." Defendant received this telegram, and on the strength thereof refused to deliver the goods to the consignees. Thereupon plaintiff wrote the following letter, which was delivered to one of the consignees, and by them presented to the railway company at its office in Chicago, Ill. The letter read in this wise: "Chicago, Ills. July 10th, 1899. Mr. Norris, C. R. I. & P. Agent at Chicago—Dear Sir: I wired you Saturday, July 8th not to deliver any eggs billed to O. C. Knispel and Co. and Knispel and Lenhart without bills of lading, that I would call on you to-day. That I held bills of lading. Now I saw the gentleman and I think

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he is A No. 1, so I will recall that order and you deliver the eggs to them without the bills of lading as you have done in the past. Yours respectfully, H. W. Schlichting." When the goods were demanded by the consignee, who had possession of this letter, the defendant refused to deliver because the bills of lading were not produced. Thereupon the plaintiff procured the freight receipts, and as soon as they were produced defendant delivered the goods. In the meantime the eggs had been damaged by delay in delivery, and this action is to recover these damages.

It is conceded that the eggs were in fact shipped by plaintiff, and that he was at one time the owner thereof; and the sole question in the case is the defendant's liability for the damages caused by the delay in the delivery of the goods. If plaintiff himself was responsible for the delay, or if defendant was guilty of no wrong in refusing to deliver the goods under the facts above recited, then, of course, there can be no recovery. The rules of law applicable to such matters are not in dispute, but in applying them two facts, which to our minds are quite controlling, must constantly be borne in mind. The first is that defendant was not the initial carrier, and therefore had no actual knowledge of the character of the receipt or bill of lading issued for the goods; and the other that, as plaintiff stated in his telegram that he held bills of lading for the goods, he is estopped from disputing that fact. And defendant's conduct must be measured from these view points. Where no bills of lading are issued, the carrier is justified in delivering the goods to the consignee without the production of receipts or other evidences of ownership issued to the consignor. In such cases the carrier is justified in assuming that title to the goods passed to the consignee on delivery to it for shipment. This is fundamental. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *Dyer v. Great Northern R. R. Co.* (Minn.) 53 N. W. 714, 38 Am. St. Rep. 506; *Sweet v. Barney*, 23 N. Y. 335. But if the carrier has notice that the consignee is not the owner, nor entitled to receive the goods, delivery to him will constitute a conversion. *Nanson v. Jacob* (Mo.) 6 S. W. 246, 3 Am. St. Rep. 531; *Bank v. R. R. Co.* (Pa.) 30 Atl. 228; *Jellett v. R. R. Co.* (Minn.) 15 N. W. 237. Indeed, a carrier is generally held liable for the delivery of goods to a person not authorized to receive them, and its good faith in making such delivery is no defense. The question is not of care, for in such cases the carrier acts at its peril. And so it has been held that it is no excuse for the carrier to show that the delivery was secured by the third person through mistake or fraud, or that the person to whom delivery was made impersonated the consignee, or held an order from the consignee which was a forgery. *Hall v. Boston, etc., R. Corp.*, 14 Allen, 439, 92 Am. Dec. 783; *Gibbons v. Farwell* (Mich.) 29 N. W. 855, 6 Am. St. Rep. 301; *Foy v. R.*

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R. Co. (Minn.) 65 N. W. 627; *American Co. v. Milk*, 73 Ill. 224; *Pacific Exp. Co. v. Critzer* (Tex. Civ. App.) 42 S. W. 1017. As we have seen, the defendant had the right to assume, when it received plaintiff's telegram, not only that bills of lading were issued, but that these instruments reserved to the consignor the control and disposition of the goods. In such cases the bill of lading stands for the goods, and it may be transferred or assigned so as to pass all right in the property to the indorsee or assignee. *Garden Grove Co. v. H. & S. R. R. Co.*, 67 Iowa, 533, 25 N. W. 761; *Weyand v. R. R. Co.*, 75 Iowa, 579, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504; *Ayers v. Dorsey*, 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376; *First Nat. Bank v. Mt. P. Milling Co.*, 103 Iowa, 518, 72 N. W. 689. When a bill of lading, such as defendant had the right to assume was issued in this case, is given to the consignor, the carrier is justified in refusing to deliver the goods unless the instrument itself be produced. It may be, as claimed by appellant, that it is not required to do so, but, as that proposition is not involved, we do not care to make any definite pronouncement at this time. As sustaining the rule, see *Garden Grove v. R. R.*, supra; *Boatman v. R. R. Co.* (Ga.) 7 S. E. 125; *Furman v. R. R. Co.*, 106 N. Y. 579, 13 N. E. 587; *Bass v. Glover*, 63 Ga. 745; *Gates v. R. R. Co.*, 42 Neb. 379, 60 N. W. 583; *Merchants' Des. v. Merriam* (Ind. Sup.) 11 N. E. 954; *Ratzer v. R. R. Co.* (Minn.) 66 N. W. 988, 58 Am. St. Rep. 530; *Union Pacific Co. v. Johnston* (Neb) 63 N. W. 144, 50 Am. St. Rep. 540; *Midland Nat. Bank v. R. R. Co.* (Mo. Sup.) 33 S. W. 521, 53 Am. St. Rep. 505. In the case last cited it is held that delivery by the carrier to one holding a duplicate bill of lading would not release it from liability if the original bill had been transferred, and was held by one who had advanced money thereon. Of course, the carrier may always deliver the goods to the person entitled thereto without the production of the bill of lading. But it takes its chances on so doing, and, when informed that a bill of lading is out, which reserves to the consignor control of the goods, it may insist upon the production of the instrument for its own protection. We have seen that the question in such cases is not good faith or due care on the part of the carrier. Ordinarily it is bound to make delivery to the right person, and if it fails to do so it is liable for conversion. *Pacific Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324. From these rules it follows that when the defendant received plaintiff's telegram it was justified in assuming that bills of lading were out, which reserved to the consignor complete control of the goods. These bills were assignable, and an assignee thereof before delivery of the goods would be entitled to receive them from the railway company, even against a written order such as was embodied in the letter of July 10th. Held bound to deliver to the proper person, the

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defendant company was justified under the circumstances in refusing to deliver until the bills of lading or freight receipts were produced. When these were produced, delivery was promptly made, and, whatever the delay, it was due to plaintiff's conduct with reference to the goods. Had it delivered the goods pursuant to plaintiff's letter, and it should have transpired that the bills of lading had been assigned prior to the time the letter was written, defendant could not have defeated an action by the assignee for conversion by showing the facts above recited. Delay in delivery was due to plaintiff's own conduct, and not to any wrong of the defendant.

Evidence was offered to prove a custom to deliver without the production of bills of lading. The evidence was not sufficient to establish any such custom, even if it was competent to prove it. But we doubt the admissibility of such evidence. *Bank v. Bissell*, 72 N. Y. 615; *Bank v. R. R. Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

The order directing a verdict for defendant was right, and it is affirmed.

BOONE *et ux.* v. OAKLAND TRANSIT CO.

(*Supreme Court of California, July 2, 1903.*)

[73 Pac. Rep. 243.]

Injury to Passenger—*Res Gestæ*—Statements of Conductor.*

In an action for injuries sustained by a street car passenger while attempting to alight, statements of the conductor after he had gone from where the car stopped to where plaintiff lay on the ground, almost half a block away, and back again to the car, formed no part of the *res gestæ*.

Evidence—Prejudicial Error.

The admission of incompetent statements of a street car conductor that the passenger, injured while attempting to alight, blamed him, and thought it was his fault, was prejudicial error, in an action for the injuries sustained.

Evidence.

Where, in an action for injuries sustained by a street car passenger while attempting to alight, there was evidence that after the passenger was thrown off her balance she held to a stanchion and was dragged some distance, the testimony that, in response to call by passengers to ring the bell, some one answered that it was no use to ring the bell, as the car would not stop unless the conductor rang it, was immaterial.

Instructions.

Where, in an action for injuries sustained by a street car passenger while attempting to alight, the evidence showed that before the car had entirely stopped it again started suddenly, and thus caused the passenger to be injured, an instruction that, when a car was stopped to allow a passenger to get off, it was the duty of the employees of the

*Declarations of railroad employees as *res gestæ*, see note appended to *Louisville & N. R. Co. v. Landers* (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96; *Roberts v. Port Blakely Mill Co.* (Wash.), 6 R. R. R. 403, 29 Am. & Eng. R. Cas., N. S., 403; *Murray v. Boston & M. R. R.* (N. H.), 7 R. R. R. 623, 30 Am. & Eng. R. Cas., N. S., 623.

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company to see that no passenger was in the act of alighting before again starting the car, was inapplicable to the evidence.

Passengers—Opportunity to Alight—Degree of Care.†

The duty of a street railway company to afford its passengers reasonable opportunity to get off its cars is no greater than that of the ordinary steam railroad company.

Injury to Passenger—Contributory Negligence—Burden of Proof.

The proof of the injury to a passenger casts on defendant the burden of proving that it was occasioned by contributory negligence of the passenger, unless the evidence on his part tends to show that the injury was due to his negligence.

Department 1. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by J. B. Boone and wife against the Oakland Transit Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Harmon Bell, for appellant.

Snook & Church, for respondents.

SHAW, J. This is an action to recover damages for personal injuries to the plaintiff Ollie Boone. The verdict was for the plaintiffs, and judgment was entered thereon. The defendant appeals from an order denying its motion for a new trial. The evidence on behalf of the plaintiff was to the effect that she was a passenger on one of the defendant's cars, sitting on one of the rear open seats of the car on a street in Oakland, and that she wished to get off at Third avenue; that as the car left Second avenue she told the conductor to stop at Third avenue, and understood him to say that he would; that as the car approached nearly to Third avenue it slowed down, apparently as if about to stop to enable her to get off; that in anticipation of its stopping she stood up on the step or running board of the car, holding onto one of the stanchions with her left hand; that the car, instead of stopping, started up very suddenly and unexpectedly, whereby she was thrown to the ground and injured. It cannot be seriously contended that the evidence was not sufficient to justify the verdict. The defendant complains of several rulings of the court, specified as errors of law, which we think are so serious as to demand a reversal of the judgment.

1. Over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the plaintiff lay, and again returned to the car, the witness had a conversation with him in which he said: "These ladies seem to blame me—seem to think it is my fault." This was not a part of the *res gestæ*. It happened after the accident, and after a sufficient time had elapsed for the conductor to walk almost half a block and

†As to care required in receiving and discharging passengers, see monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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back again. It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault. Its admission was against all the rules with relation to *res gestæ*. Jones on Evidence, § 360; Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115; Durkee v. C. P. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562. Nor can it be said that the testimony was not injurious. Its effect was to get before the jury the opinions of the persons who saw the accident that the cause was the fault of the conductor; that is, that it was due to his neglect. Such opinions expressed at the time are likely to have great weight with a jury. There can be no question but that the opinion of a witness who saw the accident, whether or not it was caused by the negligence of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case.

2. As the case may be retried, it is proper to notice some other objections made, some of which we think are well taken, although perhaps they could not be sufficient of themselves to justify a reversal. There was evidence to the effect that, after the plaintiff was thrown off her balance, she still held to the stanchion, and was dragged some distance by the car; that, while she was in that position, there were calls by different passengers to ring the bell and stop the car. Mrs. Woods, a witness for the plaintiff, testified that at that time some one answered: "No use ringing the bell. Won't stop the car unless the conductor rings the bell." Defendant moved to strike out this part of the testimony, and the motion was denied. The testimony was entirely immaterial, and should have been stricken out.

3. Instruction numbered 4 given to the jury related to the duty of employees of a street car company, when the car is stopped to allow a passenger to get off, to ascertain whether or not those who are endeavoring to get off have actually accomplished their design before the car is again started, and stated that it is their duty in such a case to see that no passenger is in the act of alighting, or in a position which would be rendered perilous if the car were put in motion. There was no evidence in this case that the car had stopped. On the contrary, the evidence showed that before the car had entirely stopped it again started suddenly, and thus caused the plaintiff to be injured. The instruction, therefore, was not applicable to the evidence, and should not have been given.

4. The court instructed the jury that the duty of a street railroad company to afford its passengers reasonable opportunity to get off of its cars is more onerous than that of an ordinary steam railroad company. We think this instruction was cor-

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rect in point of fact, for the reason that a street railroad car is obliged to stop more frequently, and is operated with less precision as to the time of starting and stopping, than the ordinary steam railroad. But the duty, though more onerous to the company, is no greater to the passenger than that of a steam railroad company. It was therefore, perhaps, a harmless instruction, but, being an instruction upon a question of fact, it should not have been given.

5. Instruction numbered 12 was as follows: "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or by some other cause which human care and foresight could not prevent." We think this instruction correctly stated the law as applied to the facts in this case. *Bosqui v. Sutro R. R. Co.*, 131 Cal. 390, 63 Pac. 682.

We do not think it necessary to discuss other points mentioned in the briefs. For the reasons given, the order denying a new trial is reversed, and the cause remanded.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

CHICAGO & N. W. RY. CO. v. DE CLOW.

(Circuit Court of Appeals, Eighth Circuit, July 7, 1903.)

[124 Fed. Rep. 142.]

Carriers—Injury to Passenger—Future Damages—They Must Be Reasonably Certain.*

The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such pain and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future effects are too remote and speculative to form the basis of legal injury.

Same.

A charge that a plaintiff could recover compensation "for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future"—is not error, in the absence of any suggestion or request for a modification or explanation of the instruction before the jury retires.

Evidence—General Objections.

General objections to a question or to an offer of evidence cannot

*Future pain and suffering as an element of damages, see note appended to *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188.

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be sustained if any part of the evidence which counsel seek to elicit by the query, or which they offer to introduce, is admissible.

Trial—Question of Fact—Withdrawal from Jury.

It is only when the evidence is such that all reasonable men in the exercise of an unprejudiced judgment must reach the same conclusion that a court may lawfully withdraw a question of fact from the jury.

Evidence—Inconsistent Testimony—Impeachment.

Statements of witnesses inconsistent with their testimony upon material issues are competent and material evidence to impeach their credibility.

Appeal—Objection Not Raised Below.

When a complaint states a cause of action upon contract and one in tort arising out of a single wrongful act, and the case is tried, and the court charges the jury on the theory that the action is for breach of a contract, without objection or suggestion by the defendant that the plaintiff has waived his cause of action upon the contract by pleading the tort, it is too late to present that objection in an appellate court for the first time.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

On September 15, 1899, the plaintiff below, W. L. De Clow, was riding as a passenger in the caboose of a freight train of the Chicago & Northwestern Railway Company, which was transporting some horses for him, when the train was so suddenly stopped that he was thrown against the corner of the conductor's desk, and his right kidney was so seriously injured that he continued to suffer from the accident until the trial of the action, more than two years later. His condition was not then improving. He sued the railway company for his injury, and for injury to his horses, on account of this accident, and recovered a verdict and a judgment, which this writ of error challenges.

Frank F. Dawley (N. M. Hubbard, Jr., and C. E. Wheeler, on the brief), for plaintiff in error.

P. W. Tourtellot and E. H. Crocker (Henry Rickel, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law. *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42, 45; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534, 542, 75 Am. Dec. 258; *Fry v. Railway Co.*, 45

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Iowa, 416, 417; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Ford v. City of Des Moines*, 106 Iowa, 94, 97, 75 N. W. 630; *Chicago, R. I. & Pac. R. Co. v. McDowell* (Neb.) 92 N. W. 121.

The chief complaint of the trial below is that in its rulings upon testimony and in its charge to the jury the Circuit Court violated this rule. The plaintiff's attending physician testified that his right kidney was seriously affected; that in his opinion its unhealthy condition was caused by the accident; that he thought the disease in it had reached a chronic state; that the tendency was for it to continue in that condition; that if the plaintiff pursued the usual modes of living his condition would get worse; that the disease would tend to acute nephritis, and as that would proceed it would go on to Bright's disease of the right kidney; and that Bright's disease usually proves fatal. After this witness had retired from the stand Dr. Raymer was called by the plaintiff. He testified that he first examined the plaintiff the day before he testified. He then answered questions as an expert, and among other things said that the probable result of the injury the plaintiff had suffered was that he would tend to get worse; that there was some danger in a case of his kind that the high specific gravity of his urine which had been proved would give rise to Bright's disease or pyelitis or cystitis; that he would hardly say that these results were more likely to occur than not to occur, but that they were things to fear. Thereupon his examination proceeded in this way:

"What is the nature of the disorders such as Bright's disease, and the other disorders, pyelitis and cystitis, that you have mentioned, as to their ultimate effect and termination? (Defendant objects because incompetent and immaterial; there is no evidence that plaintiff has Bright's disease or will have or is likely to have. Overruled, and defendant excepts.) A. Some of these diseases, such as pyelitis and inflammation of the kidney, such as Bright's disease, endanger life. An inflammation of the kidney is not necessarily fatal, but it will endanger life, and may ultimately cause the death of the patient sooner than he would otherwise die. Q. Is there any known cure for either Bright's disease or pyelitis? (Defendant objects as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.) A. That would be depending on the case and on the stage of the disease. A great many cases of acute Bright's disease get well. Many cases of pyelitis get well, depending on what has been the cause, and whether the cause can be removed at once. But after they have reached

a certain stage, and if the cause is such that it cannot be removed, then they are incurable. If it is due to injury, then it depends upon how long that cause has been in existence, and how removable the results of the injury are. The progress of the disease may be either quick or slow. Q. Under what condition is development slow and under what conditions is it quick? (Defendant objects as being incompetent, immaterial, and vague, calling for a lecture on the subject. Overruled, and defendant excepts.) A. Where the cause is comparatively mild and of long continuance, of course in those cases we would expect the results to come on slowly."

In its instruction to the jury upon the subject of damages the court, while speaking of the plaintiff, said:

"Then he is entitled to compensation for the pain and suffering he had undergone in the past, and for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future; he is entitled to receive damages for that."

The criticism of the admission of the testimony challenged is that there was no evidence at the time it was admitted which would warrant a finding by the jury that it was reasonably certain that Bright's disease or pyelitis or cystitis would result from the injury, and therefore evidence relative to the nature of these diseases was immaterial and manifestly prejudicial to the defendant. This conclusion is conceded to be a rational deduction from the premises assumed. But the assumption that there was no testimony from which a jury might lawfully infer that one of these diseases was reasonably certain to be caused by the accident is not sustained by the evidence in this record, and when the premises fall the conclusion follows. The plaintiff's attending physician had testified that he had treated him at times for more than two years after the injury; that his condition was not improving; that his right kidney was in a chronic state of disease; that it would naturally get worse; that the disease would tend to acute nephritis, and as that would proceed it would go on to Bright's disease. The effect of this testimony was that, if the chronic disease of the plaintiff's kidney pursued its natural course, it would go on into Bright's disease. It cannot be truthfully said that no reasonable man would be of the opinion that the natural course of a disease is its reasonably certain course, and in this state of the case it is not the province of a court to declare that a jury could not lawfully reach this conclusion. It is only when the evidence is such that all reasonable men, in the exercise of an unprejudiced judgment, must reach the same conclusion, that a court may lawfully withdraw a question of fact from the jury. There was therefore evidence from which the jury could lawfully find that Bright's disease was reasonably certain to result from the plaintiff's injury. But there was no evidence that

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pyelitis or cystitis was reasonably certain to follow the accident. Turn, now, to the three questions challenged by the objections of the railway company. Each seeks information relative to the character not only of Bright's disease but of one or both of the other diseases to which reference has been made. These questions were met by the general objections and by a specific objection to the testimony relative to Bright's disease only. The testimony to the character of that disease was competent and material. Either party had the right to prove the nature and effect of the disease which the plaintiff's attending physician had testified would be the natural result of his injury in the usual course of events. The objections to the evidence sought were therefore properly overruled. General objections to a question propounded to a witness cannot be lawfully sustained if any part of the testimony which the examiner seeks to elicit by the query is admissible over the objections. The specific objection to the testimony relative to Bright's disease was properly overruled because the evidence relative to that disease was competent, and the general objections to the testimony relative to the three diseases were properly overruled because the testimony relative to one of them was admissible.

Nor is the exception to the charge of the court more tenable. If the instruction that the plaintiff was entitled to compensation "for any pain and suffering he may be called upon to undergo in the future" stood alone, without qualification by any other part of the court's directions to the jury, it would undoubtedly be erroneous. The authorities cited for the defendant go no farther. But this sentence did not stand alone. The court was evidently conscious of the inherent error in the unqualified statement it contained the moment it was uttered, and it instantly added: "That is, in case you find that he will suffer pain and suffering in the future." It is clear that the court made this qualification of its first statement for the express purpose of conforming its charge to the established rule which was evidently in its mind, and which stands at the opening of this opinion; and it is also obvious that both the court and the counsel for the railway company supposed that this purpose had been fully accomplished, for, while a formal exception was taken to this paragraph, exceptions were also taken to 23 other paragraphs of this charge, all but 4 of which have been abandoned, and no suggestion was made to the court before the retirement of the jury that it had failed in its attempt to give them the correct rule of law upon the subject under consideration. In our opinion, there was no such failure. The jury has found under this charge that the plaintiff will endure all the future suffering for which they have given him compensation. In order to reach the conclusion that the court was guilty of prejudicial error in this instruction, the presumption must be indulged that the jury has found that the plaintiff will en-

dure future suffering that it was not reasonably certain from the evidence that he would sustain; that they have found that he will suffer what they were not reasonably certain that he would suffer. This presumption is too violent and irrational for us to raise. There is no such legal presumption. An appellate court cannot and ought not to create it, and there was no prejudicial error in this part of the charge.

The conductor of the train upon which the plaintiff was injured was a witness for the defendant. In his direct examination he testified to two conversations which he had with the plaintiff, one at Moingona, where the accident happened, and one shortly after they left that place. He also testified that the stop of the train at the time of the accident was a gradual one, and that there was no sudden jar or noise of the cars coming together outside of the regular jars that are felt when a train is going around a curve. Upon cross-examination counsel for the plaintiff asked him this question: "Q. Shortly after you left Moingona, didn't you use the following language in a conversation with Mr. De Clow, referring to this shock, 'I have had a talk with the engineer about the matter, and hope you won't report it,' or words to that effect, in the way car on that train?" He answered, over the objection of the defendant that the testimony was immaterial, not cross-examination, and not having any bearing on the character of the shock, "I remember no such talk." On rebuttal the plaintiff testified that after they left Moingona the conductor told him that he had talked with the engineer about the shock of the stop, and that he hoped that the plaintiff would not report it. To this testimony the defendant objected, just after it had been elicited, that it was not proper rebutting evidence, that it was hearsay, that it was not part of the *res gestæ*, and that it was not binding on the defendant. The court overruled these objections, and the defendant excepted. There was no motion to strike out the last answer, and the objections to it after it had been made came too late to entitle the defendant as a matter of right to a review of the question it presents in an appellate court. But there was no error in either of the rulings, if they had both been subject to review. The question propounded to the conductor was proper cross-examination upon the conversations which he had related in his direct testimony. He had stated a part of two conversations, and opposing counsel had the right to inquire concerning the other parts of those talks which their client related.

Nor was the testimony of the plaintiff of the statement of the conductor that he had conversed with the engineer about the shock and that he hoped that the plaintiff would not report it immaterial or inadmissible. That statement was inconsistent with the conductor's testimony that there was no unusual shock or jar when the train stopped, and the fact, if it was a fact, that he made this statement before the trial,

had a direct tendency to impeach the credibility of his testimony upon the crucial issue in the case. Prior statements of witnesses inconsistent with their testimony upon material issues are always competent to impeach their credibility. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 477, 11 Sup. Ct. 569, 35 L. Ed. 213.

Counsel for the railway company assail the charge of the court upon the burden of proof. They concede, however, that the instructions it delivered were correct if the plaintiff was entitled to recover for breaches of contracts of carriage under the averments in his complaint. There were two causes of action and two counts in the complaint in this suit—one for injury to the person of the plaintiff, and the other for injuries to his horses. In stating the first cause of action he alleged that he was a passenger on the freight train, that it was carelessly and negligently stopped, and that by reason of this negligent stop he was injured. In stating his second cause of action he averred that he shipped over the defendant's railroad several carloads of horses and colts; that while they were en route the train which carried them was so carelessly and recklessly operated that they were injured. Now, the attack of counsel for the railway company upon the portion of the charge in hand is founded entirely upon the assumption that the plaintiff waived his causes of action for breaches of the contracts because he alleged in each count of his complaint that the train was negligently stopped, or, in other words, that the contracts were negligently and recklessly broken. The record discloses no suggestion or contention on his part for this construction of the complaint at the trial in the court below, and no objection or exception to the charge in which this theory was either developed or mentioned. Each count of the complaint plainly charged a breach of contract—the first in the averment that the plaintiff was a passenger in one of the defendant's trains, and that he was injured by its movements; the second in the allegations that the plaintiff shipped the stock over the defendant's road, and that they were injured by the operation of the train. The only basis for the contention of counsel for the railway company that the causes of action upon the contracts were waived is that the plaintiff alleged that the train was so negligently and recklessly operated and stopped that the injuries were inflicted. The truth is that the complaint well states two causes of action upon contract and two causes of action in tort which arose out of the single tortious act which was in itself a violation of both the contracts. Forms of action are abolished by statute in the state of Iowa (*McClain's Ann. Code Iowa 1888, § 3712*); and the plaintiff is required to insert in his complaint a statement of the facts constituting his cause of action and a demand for the relief to which he considers himself entitled (*section 3852, McClain's Ann.*

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Code Iowa 1888). The pleadings and practice in actions at law in the national courts are required to conform as nearly as may be to those in the state courts in like cases. Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]. If a statement of the facts constituting the plaintiff's cause of action discloses two causes of action, or two reasons why he is entitled to the same relief, it is not perceived that he necessarily waives either cause by making the statement of the facts in the manner prescribed by the Code. It is possible that by a proper motion made before the evidence was introduced counsel could have compelled the plaintiff to elect whether he would proceed in this action for breaches of contracts or for torts. But it is certain that it is too late to make that motion now, or to successfully claim in this court for the first time that the plaintiff waived his causes of action for breaches of his contracts when his complaint plainly stated them, and when no such suggestion or objection was made in the court below either during the trial or at the close of the charge to the jury. When a complaint states a cause of action upon contract and one in tort arising out of a single wrongful act, and the case is tried, and the court charges the jury on the theory that the action is for breach of the contract, without objection or suggestion by the defendant that the plaintiff has waived his cause of action upon the contract by pleading the tort, it is too late to present that objection in an appellate court for the first time.

There was no substantial error in the trial of this case, and the judgment below must be affirmed.

It is so ordered.

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(Supreme Court of Louisiana, April 13, 1903.)

[34 So. Rep. 579.]

Passengers Alighting from Trains at Invitation of Trainman—Right to Assume Due Care on Their Part.

Parties embarking on or alighting from railway trains upon the invitation, express or implied, of its officials, are justified in acting upon the assumption that the officials have taken proper precautions to insure their safety.

Injury to Passenger—Presumption of Negligence.*

Where an accident happens to a passenger by the breaking of one of the railway company's appliances, the burden is upon it to show

*Presumption of negligence from injury to passenger, see foot-note appended to *Western Maryland R. Co. v. State* (Md.), 6 R. R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904; *Texas & P. Ry. Co. v. Gardner* (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759; *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624; *Le Blanc v. Sweet* (La.), 2 R. R. R. 243, 25 Am. & Eng. R. Cas., N. S., 243; *Davis v. Paducah Ry. & Light Co.* (Ky.), 4 R. R. R. 684, 27 Am. & Eng. R. Cas., N. S., 684; *United*

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affirmatively a condition of things which would exonerate it from liability. A railroad company is bound to know of the effect of time and weather upon its appliances. It should, by proper inspection, and timely changes and renewals, keep them safe.

Discharging Street Railway Passengers at Dangerous Places.

Even should a railway company be under no direct obligation to repair or keep in good condition the bridges or streets along its line of way, it should avoid stopping its cars at places where it is not safe for passengers to embark or alight. It should either stop its cars short, or pass them beyond the danger points.

Same—Defective Station Steps—Liability as Licensee.†

A railway company which uses as a station for embarking or disembarking its passengers a pavilion constructed upon a street, is liable to a passenger for injuries received from the breaking of a rotten plank in the steps leading to the cars, whether the station was constructed by it or not. It is liable as a licensee.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Alfred Dillingham Land, Judge.

Action by Jeannette Leveret and husband against the Shreveport Belt Railway Company. Judgment for plaintiffs, and defendant appeals. Modified.

Rys. & Elec. Co. of Baltimore v. Beidelman (Md.), 4 R. R. R. 662, 27 Am. & Eng. R. Cas., N. S., 662; notes, 14 Am. & Eng. R. Cas., N. S., 289; 16 Am. & Eng. R. Cas., N. S., 128; 17 Am. & Eng. R. Cas., N. S., 240; *Arkansas Midland Ry. Co. v. Griffith* (Ark.), 9 Am. & Eng. R. Cas., N. S., 846; *Bassett v. Los Angeles Traction Co.* (Cal.), 22 Am. & Eng. R. Cas., N. S., 5; *Chicago, B. & Q. R. Co. v. Hague* (Neb.), 4 Am. & Eng. R. Cas., N. S., 476; *Chicago, B. & Q. R. Co. v. Wolfe* (Neb.), 22 Am. & Eng. R. Cas., N. S., 26; *Cooper v. Georgia, etc., Ry. Co.* (S. Car.), 22 Am. & Eng. R. Cas., N. S., 667; *Dampman v. Pennsylvania R. Co.* (Pa. St.), 2 Am. & Eng. R. Cas., N. S., 219; *Dennis v. Pittsburgh & C. S. R. Co.* (Pa. St.), 2 Am. & Eng. R. Cas., N. S., 220; *East Tennessee, etc., R. Co. v. Miller* (Ga.), 2 Am. & Eng. R. Cas., N. S., 216; *Felton v. Holbrook* (Ky.), 17 Am. & Eng. R. Cas., N. S., 146; *Fremont, E. & M. V. R. Co. v. French* (Neb.), 4 Am. & Eng. R. Cas., N. S., 365; *McCafferty v. Pennsylvania R. Co.* (Pa.), 16 Am. & Eng. R. Cas., N. S., 122; *Mexican Cent. R. Co. v. Laurecilla* (Tex.), 2 Am. & Eng. R. Cas., N. S., 219; *Norfolk & W. R. Co. v. Marshall* (Va.), 2 Am. & Eng. R. Cas., N. S., 220; *Perry v. Malarin* (Cal.), 2 Am. & Eng. R. Cas., N. S., 219; *St. Joseph & G. I. R. Co. v. Hedge* (Neb.), 2 Am. & Eng. R. Cas., N. S., 219; *St. Louis & S. F. R. Co. v. Burrows* (Kan.), 17 Am. & Eng. R. Cas., N. S., 678; *Saunders v. Chicago & N. W. R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 220; *Spencer v. Chicago, M. & St. P. Ry. Co.* (Wis.), 17 Am. & Eng. R. Cas., N. S., 163; *Sprague v. Southern Ry. Co.* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 356; *Steele v. Southern Ry. Co.* (S. Car.), 14 Am. & Eng. R. Cas., N. S., 350; *Whitney v. New York, etc., R. Co.* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 184; *Albion Lumber Co. v. De Nobra* (U. S.), 3 Am. & Eng. R. Cas., N. S., 564; *Chicago, R. I. & P. R. Co. v. Zerneck* (Neb.), 17 Am. & Eng. R. Cas., N. S., 76; *Southern Ry. Co. v. Dawson* (Va.), 18 Am. & Eng. R. Cas., N. S., 592; *Baltimore & O. S. W. Ry. Co. v. Hausman* (Ky.), 17 Am. & Eng. R. Cas., N. S., 237; *Harrison v. Sutter St. Ry. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 809; *Illinois Cent. R. Co. v. Kuhn* (Tenn.), 22 Am. & Eng. R. Cas., N. S., 324.

†Carrier's duties as to safety of stations, platforms, and stopping places, see monograph appended to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131; *Houston,*

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William Henry Wise, for appellant.
Shepherd & Land, for appellees.

Statement of the Case.

NICHOLLS, C. J. Defendant, a street railway corporation, appeals from a judgment against it in favor of the plaintiff for \$3,500, as damages for injuries received for which she charged it to be responsible. The judgment was based upon the verdict of a jury. She alleged that on defendant's right of way in Parkview, at the intersection of Laurel street and Park avenue with right of way, it had erected a covered platform, called the "West Shreveport Station," for the accommodation of passengers who desired to ride on their cars, and all cars stopped at said depot to take on and discharge passengers; that on the night of November 10, 1901, there was no light at said station, and she was on said platform, awaiting a car of the company; that when she was about to step on the car the floor of said station contained a plank adjacent to the rail, some 11 inches from the same, which was rotten, and the same gave way, and her foot and left leg passed through the plank, wrenching her leg and bruising the same; that the injuries produced disease of the bone, from which she had suffered intense pain, and had disabled her from her daily duties, and confined her to her bed for nearly three months, and she was still unable to walk without crutches; that she was an invalid, and unable to endure the use of remedies to alleviate the pain, and that her injuries were permanent; that she was without fault, and the injuries received were due solely to the gross carelessness of the defendant. She set up different items of specific damages, and also a claim for \$4,500 for the pain and suffering occasioned her by the injuries.

Defendant pleaded the general issue, and averred that, if plaintiff was hurt as alleged, it was due to her own carelessness and negligence, and not to that of the company; that she was guilty of contributory negligence and could not recover.

Opinion.

In the brief filed on defendant's behalf it is urged that the platform through which plaintiff fell and injured herself was built in a street by parties not interested in defendant com-

E. & W. T. Ry. Co. v. Grubbs (Tex.), 3 R. R. R. 754, 26 Am. & Eng. R. Cas., N. S., 754 (platform used exclusively for freight); *Herrman v. Great Northern Ry. Co.* (Wash.), 4 R. R. R. 154, 27 Am. & Eng. R. Cas., N. S., 154; *Montgomery St. Ry. v. Mason* (Ala.), 5 R. R. R. 316, 28 Am. & Eng. R. Cas., N. S., 316; *Sweet v. Louisville Ry. Co.* (Ky.), 3 R. R. R. 768, 26 Am. & Eng. R. Cas., N. S., 768; *Lake St. L. R. Co. v. Burgess* (Ill.), 7 R. R. R. 136, 30 Am. & Eng. R. Cas., N. S., 136; *Southern Ry. Co. v. Reeves* (Ga.), 6 R. R. R. 870, 29 Am. & Eng. R. Cas., N. S., 870; *Mayne v. Chicago, R. I. & P. Ry. Co.* (Okla.), 6 R. R. R. 61, 29 Am. & Eng. R. Cas., N. S., 61; *Kansas City, M. & B. R. Co. v. McShan* (Miss.), 6 R. R. R. 768, 29 Am. & Eng. R. Cas., N. S., 768.

pany or its operations, and hence defendant was not liable for injuries received; that the defect in the plank through which the plaintiff fell was latent, and not discoverable by ordinary and proper inspection; and that, if defendant was liable at all, the damage awarded was excessive. Defendant says: "The evidence is that real estate agents at the city of Shreveport, who are interested in the sale of suburban property, erected on the street near defendant's road a pavilion for the accommodation of persons visiting the property offered for sale, and also erected a platform adjacent thereto, and alongside the track of defendant company, and which was constructed in the middle of the street. This platform was flush with the rails, and about one foot above the ground covered by it. The defendant company does not controvert the principle of law, announced in numerous decisions of this court, that a railroad company is required to keep the stations and platforms used by passengers in getting on and off its cars in good condition, and is responsible for damages for neglect to keep them in proper condition, but holds this is not a case for the application of the legal principle involved in these suits. The defendant company had nothing whatever to do with placing the platform in the street, and, indeed, had no control whatever over it. And it is not disputed that the president of the defendant company requested the persons who had placed it there to remove it. It is true that cars stopped on that side of the street, when moving in the direction where the platform fell, on the far side of the street, as required to do, and customary in all streets. To have avoided stopping at this place would have necessitated stopping across the street, or moving the car a distance beyond the platform. We know of no authority for holding a railroad company responsible for constructions of third persons in the streets of a city, and for injuries sustained in consequence thereof. In any event, the railroad company cannot be held responsible for the injuries sustained in this case, because it is in evidence that the defect in the plank was latent, and was not and could not be discovered by proper inspection. The witness Mosely says it would have been necessary to have torn up the plank to have ascertained that it was rotten. And no one seems to have discovered the weakness of the plank until it was broken; and, moreover, he states positively that the outer surface of the plank seemed to be good. True, he says that defendants might have discovered it with a timber rod, but surely it is not required of a company who did not erect the platform, and which is not situated on the company's property, but on one of the streets of the city, to make inspection of such platform, and each plank thereon, with a timber rod. After the plank broke, and the superintendent of the defendant company learned of the accident, he had a plank put over the hole, in order to avoid the possibility of other

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accidents until the platform could be removed. The authorities are abundant that an injured party cannot recover for defects in material and appliances, platforms, etc., where not readily discoverable by ordinary inspection."

The statement made by defendant as to the parties who built the platform, and the circumstances under which it was constructed, is sustained by the evidence. The object in view having been apparently attained, the structure itself has been permitted to remain where it was placed without interference from any quarter; the sign, "West End Station," upon it, indicating the actual use to which it has been applied for many years. The parties who placed the "station" where it is have disappeared from view, leaving, so far as the record shows, the railway company in full possession, undisturbed, of the same, if not as owners, certainly as licensees. Defendant says that the structure was really an inconvenience to it, but, if so, it took no legal step to abate it (Rev. Civ. Code, art. 861); on the contrary, actually utilized it. Defendant claims that it had no control over the building. As a proposition, it might be true, were there an issue between it and the parties owning it, but it is not true as an actual fact, for the evidence discloses that the morning after the accident the broken plank was replaced by its workmen, acting under orders of its superintendent, and that the superintendent found fault with one of them for not having sooner obeyed his orders (given prior to the accident) to repair it. In Fetter's Carriers of Passengers, c. 3, § 52, the author says:

"The ownership by third persons of any portion of the station grounds or approaches used by a common carrier in receiving and discharging passengers will not affect his liability as such. The duty of a carrier to exercise a proper degree of care to keep approaches to its station grounds in repair is not affected by the fact that it has constructed such approaches over land not owned by it, but forming part of a highway. A steamboat company which lands its passengers on a wharf not owned by it makes such a wharf a part of its own means of landing, and is liable to its passengers, the same as if it owned the premises. A carrier by sea, who employs a hulk owned by people for the purpose of embarking passengers on his steamer, is liable for injuries sustained by a passenger by reason of a hatchway on the hulk being negligently left unguarded, though the hulk is under the control of the owners, and not of the carrier, since it is a part of the means of transportation, and it is part of the carrier's duty to use reasonable care for its safety. A railroad company is liable for injuries to a passenger sustained by reason of a defect in a platform leading from the train to an eating house, though the platform was constructed by hotel people, and had not been used by the railroad company for some time, where it was located on the company's right of way."

Leveret v. Shreveport Belt Ry. Co

The author cites *John v. Bacon*, L. R. 5 C. P. 437, and other authorities, in support of this position—one of them to the effect that, where the platform at a station being too high to be conveniently reached, some one had provided a plank leading up to the platform, which had been used since the depot was built, the company was held to be as much liable for injuries arising from the defects in the plank as if it had set up and maintained the dangerous way (*Collins v. Railway Co.*, 80 Mich. 390, 45 N. W. 178); another to the effect that a railroad company was bound to exercise due care in keeping in repair a bridge over a gully on its station grounds used by passengers on leaving the grounds, though the bridge had been constructed by strangers to the company (*Chance v. Railway Co.*, 10 Mo. App. 351).

Even if the defendant in this case had been under no direct obligation to repair the bridge or platform, it would have been its duty to avoid stopping its coach directly opposite to it for the purpose of taking on and putting off passengers. It was its duty to have kept advised of the condition of the bridge and platform, and not invited its customers to embark or alight at a dangerous place. There was no legal obligation on its part to have stopped the car precisely at that spot. It could and should have moved its coach further, if that place was not safe, even though the passengers might be subjected to some inconvenience. Rather this than to place them in danger.

It has been repeatedly held that parties alighting from or embarking upon a train are authorized to act upon the assumption that the officers of the company have taken proper precautions to insure their safety. Defendant says that it was not apparent that the plank was defective, and it was not called upon to know the fact. Within certain limits, a railroad company is not held to be liable for latent defects, but we do not think defendant in this case falls under the operation of the rule it invokes. The plank was unquestionably defective, for the lady who, stepping upon it, broke it, weighed only 108 pounds. We think the company was aware of its condition, but, even if, as a fact, it was not, it was its duty to have known it. A railroad company is bound to know of the effect of time and weather upon its appliances, and it should, by proper inspection and timely changes, keep them safe. *Williams v. Electric Company*, 43 La. Ann. 300, 8 South. 938. If, in consequence of a defect in its appliances, an accident occurs to one of its passengers, it should affirmatively show some state of facts tending to exonerate it. *Patton v. Pickles*, 50 La. Ann. 865, 24 South. 290; *Kennon v. V. S. & P. R. R.*, 51 La. Ann. 1599, 26 South. 466; *Aiken v. South. Pac. Co.*, 104 La. 162, 29 South. 1. Defendant has in this case made no attempt at all in that direction. Its position is that it was under no obligation at all or responsibility in the premises, and it is not supported by the law in that position.

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We are of the opinion that the judgment of the district court in favor of the plaintiff against the defendant is correct, but that the amount of damages awarded is too large. It should in that respect be amended.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and it is hereby, amended by reducing the amount of damages awarded from \$3,500 to \$2,500, and, except as so amended, the judgment appealed from is hereby affirmed; costs of appeal to be paid by the appellee.

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(*Court of Appeals of Colorado, Sept. 14, 1903.*)

[73 Pac. Rep. 664.]

Instructions.

An instruction substantially covered by instructions given is properly denied.

Street Railways—Injury to Alighting Passenger—Negligence—Prima Facie Case.*

A prima facie case of negligence is made against a street railway company by evidence that while a passenger was alighting, after its car had been stopped at a regular crossing for her to alight, the car suddenly started, throwing her to the ground and injuring her.

Appeal from District Court, Arapahoe County.

Action by Mary G. Rush against the Denver Consolidated Tramway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. M. Stevenson, Chas. J. Hughes, Jr., and Albert Smith, for appellant.

H. W. Spangler, George C. Norris, and Emerson J. Short, for appellee.

GUNTER, J. Seven errors are assigned. But two are discussed by appellant's counsel, and to these we confine the opinion.

1. Appellant (defendant) tendered an instruction which was refused. It says the instruction, in substance, charged that, if appellee (plaintiff) was not injured, she could not recover. Assuming this, the instruction was given in substance in instructions 2 and 3, wherein the sustaining of an injury through the accident was made essential to recovery.

2. It is further urged that the evidence is insufficient to justify the verdict. The evidence for appellee (plaintiff) is, in substance: Appellant, as a common carrier, was operating a street railway system in the city of Denver, using electricity as the motive power. Appellee, having paid her fare, was a passenger on one of its cars. The car stopped at a regular crossing

*See preceding case and foot-note.

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for her to alight. While she was doing so, the car suddenly started, and by doing so threw her to the ground. Therefrom she sustained injuries, compensation for which is sued for. There was also expert testimony in her behalf that her injured condition was caused by a fall or a concussion of some kind, due to some external violence; also to the extent of her injuries. In making out her case, there was no evidence tending to show contributory negligence. The only testimony conflicting with that in behalf of appellee is that of the conductor that no one fell on that day in alighting from his car, and of experts that appellee's injured condition was not due to a fall, and as to the extent of her injuries. The position of appellant was that she had not fallen from the car, and that she was not injured by such cause. Appellant attempts no explanation of the cause of the sudden starting of the car, or of the cause of appellee's falling. The evidence of appellee that defendant, as a common carrier of passengers, was operating a street railway, with motive power (electricity); that appellee was a passenger thereon, having paid her fare, and that the car had stopped for her to alight; that while she was doing so, and free from contributory negligence, the car started up suddenly, and thereby she was thrown to the ground and injured—raised the presumption of negligence on the part of defendant, and constituted sufficient evidence thereof to justify sending the case to the jury. The starting up and moving on of the car before plaintiff could or did alight would not ordinarily have happened, had appellant been using the high degree of care exacted of it by the law in its carrying passengers. The operating of the car was under the control of the appellant; and the explanation of the cause of the sudden starting of the car, presumably within its knowledge and capable of explanation by it. There was thus sufficient evidence to go to the jury that appellee sustained her injuries through the act of appellant, and that such act was negligently done. In *Christie v. Griggs*, 2 Campbell, 79, approved *Wall et al. v. Livezey*, 6 Colo. 465, and *Sanderson v. Frazier*, 8 Colo. 84, 5 Pac. 632, 54 Am. Rep. 544, the action was against the owner of a stage upon which appellant was traveling, when it broke down and she was injured. The first count imputed the accident to the negligence of the driver, the second, to the insufficiency of the carriage. The plaintiff having complained that the axletree snapped asunder, and that she was consequently thrown from the stage and injured thereby, defendant insisted that plaintiff was bound to go further, and give evidence of the driver being unskillful and of the stage being insufficient. The court said: "I think the plaintiff has made a prima facie case by proving her going on the coach, the accident, and the damage she has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere

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be found. * * * ” In *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, approved *Wall et al. v. Livezey*, supra; *Sanderson v. Frazier*, supra; and *Denver & Rio Grande Railroad Co. v. Fotheringham* (Colo. App.) 68 Pac. 978—the wife of the plaintiff was a passenger on the stage, and injured by its upsetting. The action was against the proprietor of the stage to recover damages. The lower court charged, inter alia: “It being admitted that the carriage was upset and the plaintiff’s wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution. * * * ” This was approved upon appeal. The upsetting of the stage was due to the manner in which it was operated and the horses handled by the driver. In *Wall et al. v. Livezey*, plaintiff was a passenger on the stage of defendant. The horses became frightened at the whistle of an engine and overturned the stage. There was no insufficiency in the stage or harness. The driver had left the horses in the hands of a bystander while he buckled the hind boot of the stage. The jury found for plaintiff, and, in affirming, the court said: “A prima facie case, however, is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred, resulting in injury to the passenger; and that it was occasioned by the failure of some portion of the machinery appliances, or means provided for the transportation of the passenger. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident, until the presumption is rebutted.” In *Sanderson v. Frazier*, plaintiff was a passenger on a stage that was upset by the wheel striking a rock, and by the upsetting plaintiff was injured. Negligence in the driver was charged. In the course of the opinion affirming the judgment for plaintiff, the court said: “In such action the facts that the coach was upset and the plaintiff injured are sufficient prima facie evidence of negligence or want of skill of the driver, and shift the burden of proof upon the defendant to show that the driver was in every respect qualified to act with reasonable skill and the utmost caution; and, if the disaster was occasioned by the least want of skill or of prudence on his part, the defendant was answerable.” In *Rio Grande W. Co. v. Rubenstein*, 5 Colo. App. 121, 123, 38 Pac. 76, the court said: “The general rule undoubtedly is that the passenger who shows that he is being carried for hire, and that the vehicle overturns and occasions his injury, has made out a prima facie case. The legal presumption, in actions of this description, is that the injuries are occasioned by the fault of the carrier or the condition of its vehicles, and th-

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law casts on it the burden of showing that it has used reasonable care and skill to provide safe appliances and a safe road for the transportation of its passengers." In *Tramway Co. v. Reid*, 4 Colo. App. 53, 69, 35 Pac. 269 (reversed in 22 Colo. 349, 45 Pac. 378, but not upon the point here cited), plaintiff sued to recover damages for injuries sustained through the alleged negligence of appellant in its management of its cars. There plaintiff, in alighting, was thrown to the ground by an unexpected and sudden jerk of the car. The court quoted approvingly from *Smith v. St. Paul R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, as follows: "From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises." This language doubtless met the approval of our Supreme Court; otherwise it would have expressed disapproval when sending the case back for a retrial, in which the question involved in the instruction would arise again. In *Denver Elec. Co. v. Simpson*, 21 Colo. 372, 41 Pac. 499, 31 L. R. A. 566, defendant was engaged in distributing electricity throughout the city of Denver by means of wires attached to poles located in the streets and alleys. Plaintiff, while passing along an alley, without fault on his part, came in contact with one of the pendent wires, highly charged with electricity, which wire had become detached from its overhead fastening, and was hanging down within about two feet of the ground in the alley. By the contact, plaintiff received a shock, and was severely injured. The court held that the wire, so charged with electricity as to become dangerous to persons coming in contact with it, detached from its fastenings, and hanging down in a public alley so as to endanger public travel, was of itself presumptive evidence of negligence on the part of defendant, and in the course of the opinion said: "Under the facts of the case, the law required of the defendant, conducting, as he did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and the present state of the particular art. This is the measure of the duty owed by a common carrier to a passenger for hire." In *Denver Con. Electric Co. v. Lawrence* (Colo. Sup.) 73 Pac. 39, 42, defendant was operating an electric plant, and therefrom supplying electricity for illuminating purposes to the residents of the city of Denver—among them, plaintiff's father. Without fault on his part, plaintiff, while attempting to turn on an electric light in his father's residence, received a severe charge of electricity. The court held that evidence of these facts was presumptive

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evidence of negligence on the part of defendant. In the course of its opinion the court said: "The business of defendant is that of selling electricity to the people of Denver—a business so fraught with peril to the public that the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its affairs under the known methods and present state of its particular art, is demanded. * * * Such injuries are not, under ordinary circumstances, received by persons who turn on an incandescent lamp, if the company supplying the current has not been negligent." In *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173, 177, 60 Pac. 780, 781, the court said: "When the plaintiff showed that the defendant had assumed to carry him as a passenger upon one of its cars, and that while being so carried he had sustained injury by reason of the manner in which the car was propelled along its track, a prima facie case of negligence was shown, which, in the absence of any other evidence, entitled him to recover." In *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, the court said: "A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control." See, also, *Osgood v. Los Angeles Traction Co. et al.* (Cal.) 70 Pac. 169. In *Shearman & Redfield on the Law of Negligence* (5th Ed.) vol. 1, § 59, it is said: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. So, also, where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstance, and thus raising the presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant." *Denver & Rio Grande v. Fotheringham* (Colo. App.) 68 Pac. 978, is not in conflict with the conclusion we have reached herein, nor is any case cited in that opinion as authority in conflict with the conclusion we have reached. Further, that case cites approvingly *Stokes v. Saltonstall*, *Wall v. Livezey*, and *Sanderson v. Frazier*, *supra*. There the plaintiff, a passenger on the defendant company's train, when the train was going into a station and slowing up, got up from her seat with the intention of going out on the platform. The door of the car was open. When she reached the door, the train had not yet come to a

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stop, and began to jerk, and plaintiff was thrown against the right side of the door, and to steady herself she put her hand against the door jamb, where the door would come in contact with it. In the jerking, the door flew shut and caught her hand. She was not yet upon the platform. The trial court held that the plaintiff had made out a presumptive case when she showed that she was injured while being carried as a passenger by defendant, and that the injury was caused by the manner in which defendant used or directed some agency or instrumentality under its control. The court said: "Such instructions, under the facts, should not have been given." The court, in the course of its opinion, said: "It was not made to appear that the peculiar motion of the car to which the plaintiff ascribed her injury is, when a train is coming to a stop, unusual, or attended with danger or even inconvenience to passengers remaining in their seats. The contrary is to be inferred from Mr. Prescott's testimony, and at the other stations where the train stopped the same 'jerking' motion does not appear to have given the plaintiff any annoyance." We think the conclusion reached in that case was correct. In the case before us the law exacted the highest degree of care on the part of appellant in transporting its passenger, the appellee. It is improbable, if such degree of care had been exercised, that the car would have started before appellee had time to alight. The fact that it did so makes it probable that the care exacted by the law of appellant was not used. The starting up of the car was under the control of appellant. Why it so started was presumably a matter which defendant could explain. The presumption therefore attaches to the facts, as disclosed by appellee's testimony, that appellant was guilty of negligence. There was no effort to explain the cause of the accident by appellant. The jury had sufficient evidence upon which to base its verdict.

The judgment should be affirmed. Affirmed.

AUGUSTA SOUTHERN R. CO. *v.* SNIDER.

(*Supreme Court of Georgia, June 1, 1903.*)

[44 S. E. Rep. 1005.]

Carriers—Injury to Passenger—Contributory Negligence.*

It is not necessarily, as matter of law, negligence for a passenger to be upon the platform of a moving train. Whether it is negligence

*See foot-note appended to *St. Louis, etc., Ry. Co. v. Leftwich* (C. C. A.), 6 R. R. R. 86, 29 Am. & Eng. R. Cas., N. S., 86; *Doolittle v. Southern Ry. Co.* (S. Car.), 1 R. R. R. 105, 24 Am. & Eng. R. Cas., N. S., 105; *Southern Ry. Co. v. Roebuck* (Ala.), 2 R. R. R. 204, 25 Am. & Eng. R. Cas., N. S., 204; *St. Louis S. W. Ry. Co. of Texas v. Ball* (Tex.), 2 R. R. R. 187, 25 Am. & Eng. R. Cas.,

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or not in a particular case must depend upon the circumstances of danger attending the act, and the reason which the passenger has for so placing himself. Ordinarily, in such cases, the question as to whether such an act is negligence is one for a jury; and unless the danger is obviously great, as where the train is moving at a rapid rate of speed, or the condition of the passenger is such as to make his presence upon the platform manifestly dangerous while the train is moving at any rate of speed, the court cannot hold, as matter of law, that the passenger's presence upon the platform is such negligence as would preclude a recovery for injuries received by being thrown from the platform by a sudden jerk of the train.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by F. M. Snider against the Augusta Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and B. F. Walker, for plaintiff in error.

K. J. Hawkins and L. W. Hardwick, for defendant in error.

COBB, J. This case comes before us upon assignments of error complaining that the court erred in overruling a general demurrer to the plaintiff's petition, and in refusing to grant a new trial, the motion therefor being based solely upon the grounds that the verdict is contrary to law and the evidence. As the evidence authorized a finding that the material averments in the petition had been established, if such evidence was sufficient in law to authorize a recovery, of course there was no error either in refusing a new trial or in overruling the demurrer. There was a conflict in the evidence as to some of the material questions. Viewing the evidence most favorably for the plaintiff, the case presented

N. S., 187; note appended to *Hicks v. Georgia S. & F. Ry. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 279; *McCurrie v. Southern Pac. Co.* (Cal.), 12 Am. & Eng. R. Cas., N. S., 170; *Bradley v. Second Ave. R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 184; *Chesapeake, etc., Ry. Co. v. Lang* (Ky.), 6 Am. & Eng. R. Cas., N. S., 776; *Fisher v. West Virginia & P. R. Co.* (W. Va.), 4 Am. & Eng. R. Cas., N. S., 86; *Mann v. Philadelphia Traction Co.* (Pa. St.), 4 Am. & Eng. R. Cas., N. S., 260; extensive note appended to *Ward v. Chicago, M. & St. P. R. Co.* (Wis.), 14 Am. & Eng. R. Cas., N. S., 322; *Watson v. Portland & G. E. Ry. Co.* (Me.), 11 Am. & Eng. R. Cas., N. S., 194; *Louisville & N. R. Co. v. Head* (Ky.), 19 Am. & Eng. R. Cas., N. S., 302; *Sanders v. Chicago, R. I. & P. Ry. Co.* (Okla.), 18 Am. & Eng. R. Cas., N. S., 244; *East Omaha St. R. Co. v. Godola* (Neb.), 7 Am. & Eng. R. Cas., N. S., 300; *Lake Shore & M. S. Ry. Co. v. Kelsey* (Ill.), 16 Am. & Eng. R. Cas., N. S., 82 (crowded car); *Cleveland, etc., R. Co. v. Moneyhun* (Ind.), 5 Am. & Eng. R. Cas., N. S., 682; *Trumbull v. Erickson* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 93 (crowded car); *Williams v. International & G. N. R. Co.* (Tex.), 3 R. R. R. 778, 26 Am. & Eng. R. Cas., N. S., 778 (negro compelled to ride on platform of crowded car); *Prescott & N. W. Ry. Co. v. Smith* (Ark.), 3 R. R. R. 809, 26 Am. & Eng. R. Cas., N. S., 809 (riding on platform of caboose to avoid danger).

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is as follows: Plaintiff was a passenger upon a mixed train of the defendant. He was in his seat when the conductor announced the name of the station which was his destination. Seeing the conductor approach a lady passenger to help her to alight from the train, he arose from his seat while the train was in motion, and proceeded to the rear door of the car. He stepped upon the rear platform while the train was moving at the rate of about four miles an hour. Seeing that the train was going to pass the usual stopping place and that the speed was not decreasing, he turned to make his way back into the car, and, just as he turned, a sudden jerk of the train made him lose his balance, and in consequence he was thrown to the ground and received injuries resulting in a strangulated hernia. The jerk was sudden, violent, and unusual. The question is whether the plaintiff was guilty of such negligence as would defeat a recovery.

It cannot be held, as matter of law, that it is negligence on the part of a passenger to leave his seat while the train is in motion, and we do not understand that this is insisted on in this case. Neither can it be held, as matter of law, that it is negligence for a passenger to go upon the platform of a car propelled by steam, while it is in motion. *Macon & Western Railroad Co. v. Johnson*, 38 Ga. 437 (7). Whether going upon the platform while the train is in motion is such negligence as to defeat a recovery by one who is injured, depends upon the speed of the train, the age and physical condition of the party, and other circumstances. Where the train is moving at a rapid rate of speed, it would be negligence in a passenger to go unnecessarily upon the platform; and, even where the train is not moving rapidly, it would be negligence per se for an infirm or enfeebled passenger to go unnecessarily upon the platform. In a case where there is nothing in the condition of the passenger to make his presence upon the platform a negligent act in itself, and where the speed of the train is not such that it would be necessarily dangerous for any one to be upon the platform, it would be a question for determination by the jury whether the presence of the passenger upon the platform was such an act of negligence on his part as would preclude a recovery by him for an injury resulting in part from his presence there. For a passenger to be unnecessarily upon the platform of a train, either standing still or in motion, might be such a negligent act on his part as would authorize the jury to reduce the damages to which he would have been entitled if he had been free from negligence. See *Macon R. Co. v. Johnson*, supra. But whether his presence upon the platform is such a negligent act as would entirely defeat his recovery, depends upon the circumstances above referred to, or others of a similar nature. See, in this connection, 5 Am. & Eng. Enc. L. (2d Ed.) 681, 682. The rule in such cases is similar.

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to that which would be operative where one alights from a moving train. In *Suber v. Railway Co.*, 96 Ga. 42, 23 S. E. 387, Mr. Chief Justice Simmons says: "It is not necessarily, as matter of law, negligent for a person to leave a moving train. Whether it is negligent or not in a particular case must depend upon the circumstances of danger attending the act, and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury; and unless the danger is obviously great, as where the train is moving at full speed, the court cannot hold that leaving the train is, as matter of law, such negligence as should preclude a recovery." The *Suber Case* has been approved and followed in *Macon Railroad Co. v. Moore*, 108 Ga. 90, 33 S. E. 889; *Coursey v. Railway Co.*, 113 Ga. 299, 38 S. E. 866; *Travelers' Protective Ass'n v. Small*, 115 Ga. 457, 41 S. E. 628. The cases relied on by counsel for plaintiff in error are, we think, distinguishable from the present case. In *Blitch v. Central Railroad*, 76 Ga. 333, it was in the night, and the train was moving rapidly. In *Patterson v. Railroad Co.*, 85 Ga. 653, 11 S. E. 872, it was in the night, and the plaintiff had not only gone upon the platform, but was standing on the steps preparing to get off at a street crossing which was not a regular stopping place. In addition to this, the *Patterson Case* must be permitted to rest upon its own peculiar facts. It has not only never been followed, but has never been cited as authority in any subsequent case.

Judgment affirmed by five Justices.

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(*Supreme Court of North Carolina, May 26, 1903.*)

[44 S. E. Rep. 401.]

Master and Servant—Railroads—Safe Place to Work—Car Platform—Violation of Rules—Contributory Negligence.*

Plaintiff, an employee of defendant railroad, was riding on the latter's freight train, sitting on the steps of a shanty car, for the purpose of viewing the country. The steps of the car struck against some wood piled by defendant's servants alongside the track, and plaintiff was injured. It was not necessary for plaintiff to sit on the platform, and he had seen defendant's rules against riding on the platform of passenger trains: *held*, defendant was not liable.

Petition for rehearing. Dismissed.

For former opinion, see 43 S. E. 1004.

W. C. Feimster and Armfield & Turner, for petitioner.

L. L. Witherspoon and S. J. Ervin, for defendant.

CONNOR, J. This cause was decided at the last term,

*As to whether it is contributory negligence to ride on the platform of a moving car, see preceding case and foot-note.

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and disposed of by a per curiam opinion. 43 S. E. 1004. Upon a petition to rehear, the case was argued, and full and exhaustive briefs filed by counsel. We have carefully considered the record and the briefs, and are of the opinion that the case was properly decided at the last term of the court.

Upon the plaintiff's evidence it appeared that he was an employee of the defendant, and was traveling from Salisbury to Gold Hill on a freight train, consisting of six or more box cars and some shanty cars; that he was sitting on the steps of one of the shanty cars, with his feet on the bottom steps of the car; that the defendant's servants had piled wood upon the side of the track about three feet high. There were benches inside the shanty car for the hands to sit upon, and there was no suggestion that it was necessary for the plaintiff to sit upon the platform. It also appeared that the company's rules against riding on the platform of passenger trains had been seen by the plaintiff. It appears that the plaintiff was sitting upon the steps for the purpose of seeing the country through which they were passing; his knees projected a few inches beyond the shanty car. The engine passed the cord wood safely, and the bottom of the box car was high enough to pass over the wood without touching it. It struck the step upon which the plaintiff was sitting. There was evidence that the plaintiff and other employees of the defendant were in the habit of riding on the shanty cars, and on the platform, and on top of the cars, or wherever they pleased. His honor being of the opinion that upon the plaintiff's own testimony he was not entitled to recover, the plaintiff in deference thereto submitted to a nonsuit.

There can be no doubt in regard to the duty of the defendant to furnish its employees a safe place in which to travel to and from their place of employment, and it is clear upon the plaintiff's testimony that the defendant had furnished a car with sufficient room and accommodation for the plaintiff and the other hands. There was no necessity for the plaintiff to sit upon the steps of the car, nor was he there in the line or the performance of any duty. Certainly he was not entitled to demand any higher degree of care upon the part of the defendant than if he had been a passenger. The passenger who needlessly exposes himself against the rules of the company, and is injured under the circumstances testified to by the plaintiff, would not be entitled to recover; and this upon the familiar principle that if one voluntarily puts himself in a place of danger, and is injured in consequence thereof, he cannot claim damages. This principle is sustained by numerous authorities. The plaintiff relies upon the case of Lindsay v. Railroad (decided at this term) 43 S. E. 511. In that case it was the duty of the plaintiff to be upon the top of the car, and the defendant, in permitting the rope to hang over the car, was clearly guilty of negligence. It was

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not one of those risks which the plaintiff assumed by taking employment. Without pursuing the subject further, we think his honor's ruling is correct. *Baltimore & Ohio R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

The petition to rehear must be dismissed.

STEEDMAN v. SOUTH CAROLINA & G. E. R. Co.

(*Supreme Court of South Carolina, July 3, 1903.*)

[45 S. E. Rep. 84.]

Injury to Passenger—Punitive Damages—Pleading.*

In an action by a passenger for injuries on a train, the complaint alleged in one paragraph that the act was done carelessly, negligently, and willfully. A second count alleged that plaintiff's injuries were caused by the willful, gross, reckless, and wanton negligence of the defendant: *held* sufficient to sustain a verdict for actual, as well as punitive, damages.

Same—Damages—Pleading—Appeal—Estoppel.

During a trial for injuries to a passenger, plaintiff's attorney admitted to the court that the complaint did not contain any allegation of actual damages, but insisted that plaintiff was entitled to recover such actual damages as he had proved: *held*, that plaintiff, on appeal, was not estopped by such statement from maintaining that it was error to exclude such issue from the jury; it appearing that it was raised by the pleadings and evidence, and the defendant was not misled by such statement.

Evidence.

Exclusion by the court of evidence offered by plaintiff in reply, which evidence is cumulative, is not error.

*As to the right to recover punitive or exemplary damages for injuries to passengers, see foot-note appended to *Birmingham Ry. Light and Power Co. v. Nolan* (Ala.), 6 R. R. R. 89, 29 Am. & Eng. R. Cas., N. S., 89 (passenger carried beyond destination); *Kibler v. Southern Ry.* (S. Car.), 6 R. R. R. 891, 29 Am. & Eng. R. Cas., N. S., 891 (refusal to accept plaintiff as passenger); *St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793; *Yazoo & M. V. R. Co. v. Faust* (Miss.), 3 R. R. R. 818, 26 Am. & Eng. R. Cas., N. S., 818; *Louisville & N. R. Co. v. Champion* (Ky.), 3 R. R. R. 732, 26 Am. & Eng. R. Cas., N. S., 732 (mistake of conductor in refusing ticket); *Louisville & N. R. Co. v. Shepherd* (Ky.), 5 R. R. R. 465, 28 Am. & Eng. R. Cas., N. S., 465 (collision); notes, 12 Am. & Eng. R. Cas., N. S., 131; 12 Am. & Eng. R. Cas., N. S., 92 (for insults); 10 Am. & Eng. R. Cas., N. S., 269 (simple negligence); 10 Am. & Eng. R. Cas., N. S., 269 (malice shown); *Barker v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 157 (for failure to carry); *Southern Ry. Co. v. Hardin* (Ga.), 10 Am. & Eng. R. Cas., N. S., 250 (failure to stop at destination); *Baltimore, C. & A. Ry. Co. v. Kirby* (Md.), 18 Am. & Eng. R. Cas., N. S., 248 (ejection); *Glover v. Charleston & S. Ry. Co.* (S. Car.), 17 Am. & Eng. R. Cas., N. S., 102 (injury to alighting passenger); *Jackson Electric Ry., Light & Power Co. v. Lowry* (Miss.), 23 Am. & Eng. R. Cas., N. S., 103 (insults); *Lexington Ry. Co. v. Cozine* (Ky.), 23 Am. & Eng. R. Cas., N. S., 624 (malicious assault by street railway conductor); *Ristine v. Blocker* (Colo.), 18 Am. & Eng. R. Cas., N. S., 139 (malicious or wanton acts by servant); *Appleby v. South Carolina & G. E. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 581 (carelessness in backing train).

Steedman v. South Carolina & G. E. R. Co

Appeal from Common Pleas Circuit Court of Kershaw County; Dantzler, Judge.

Action by J. Blake Steedman against the South Carolina & Georgia Extension Railroad Company. From judgment for defendant, plaintiff appeals. Reversed.

Wm. D. Trantham and M. L. Smith, for appellant.

E. D. Blakeney and J. T. Hay, for respondent.

WOODS, J. This action was brought to recover for personal injuries alleged to have been sustained by plaintiff, while a passenger on one of defendant's freight trains, in consequence of defendant's improper management of the train. The verdict was for the defendant, and plaintiff appeals.

1. The main question involved in the exceptions is whether the circuit judge erred in holding and instructing the jury that, under the allegations of the complaint, plaintiff could not recover actual damages, but his recovery, if any, should be limited to punitive damages. As the determination of this question depends on the construction of the language of the third and fourth paragraphs of the complaint, it is necessary to set them out at length:

"(3) That at De Kalb, a station on defendant's road between Camden and Westville, and in said county of Kershaw and state aforesaid, the train was stopped and the engine detached from the cars, for the purpose, as the plaintiff was informed and believes, of taking up cars from the siding at De Kalb, and in recoupling was, without notice or warning to the plaintiff, carelessly, negligently, recklessly, willfully, and wantonly run back against the train, and the car in which the plaintiff was seated, with great force and violence.

"(4) That at the time the engine struck the train the plaintiff was occupying his seat on a bench on the side of the car, and about half way said bench, and the collision was of such force as to throw him forward in the car; and, the engine being immediately reversed and started rapidly in the opposite direction, he was jerked backward and hurled with great violence out of the side door of the car, and down flat on his back on the ground, his head striking against something, whether the door facing or something else he cannot say definitely, but he believes it was the former, and inflicting upon the plaintiff painful, serious, and he believes permanent, injuries about his head, neck, and back, from which he suffered great pain, and still suffers constantly—all resulting and caused by the willful, gross, reckless, and wanton negligence of the defendant and its servants in backing said engine and reversing it in the manner aforesaid, to the damage of the plaintiff the sum of \$2,000."

The third paragraph sets forth that one of defendant's engines and some cars attached to it were without notice or

warning run back against the train, and the car in which plaintiff was seated, with great force and violence. This violent impact of the engine and other cars against the car of which the plaintiff was an occupant is the act which in the fourth paragraph plaintiff alleges caused his injuries, which are there recited. He had characterized this act in the third paragraph as having been done "carelessly, negligently, recklessly, willfully, and wantonly."

Under numerous decisions of this court, since the act of 1898, entitled "An act to regulate the practice in the courts of this state in actions ex delicto for damages" (22 St. at Large, p. 693), these allegations would be sufficient to sustain a verdict for actual, as well as punitive, damages. *Proctor v. Ry. Co.*, 61 S. C. 185, 39 S. E. 351; *Id.*, 64 S. C. 494, 42 S. E. 427; *Boggero v. Ry. Co.*, 64 S. C. 113, 41 S. E. 819.

It cannot be successfully contended that the insertion by the plaintiff in the fourth paragraph of the complaint, after the recital of his injuries, of the words, "all resulting from and caused by the willful, gross, reckless, and wanton negligence of the defendant and its servants in backing said engine and reversing it in the manner aforesaid," negatived the previous allegation that the act causing the injury was done carelessly and negligently, and so shut off any claim for actual damages. No doubt, before the act of 1898, the plaintiff could have been required to make his complaint more definite and certain, or to elect between punitive and actual damages. In a strict legal sense, allegations of ordinary negligence and carelessness, implying mere inadvertence, are not consistent with willfulness, which implies a purpose to do a wrong act with full appreciation of the legal wrong, nor with wantonness and recklessness, which imply a foolhardy disregard of right. Because of this inconsistency, the courts of this state, prior to the act of 1898, held that the same act could not in a single cause of action be charged as both negligent and willful, as a basis for the recovery of both actual and punitive damages. The effect of the act of 1898 is to require that, when the same act is described as negligent and as willful, the pleading shall be treated and considered as if these two inconsistent statements had been made separately in setting out the two distinct causes of action. For these reasons we think the complaint contained a sufficient statement of a cause of action for actual damages, and that the presiding judge erred in charging the jury the plaintiff could not under the allegations of the complaint recover actual damages.

2. The defendant insists, however, that the plaintiff is himself responsible for any error the court may have committed in this regard by admitting in open court the complaint would not support a verdict for actual damages. In the progress of the trial the following colloquy occurred: "Mr. Hay: We

object to any evidence of actual damage in this case upon the ground that this complaint alleges a cause of action for punitive damage entirely. The Court: It looks that way. Mr. Trantham: Have to prove some damages before we can prove punitive damages. The Court: Obligated to be some damage done, and the question then would be whether willful or intentional or not. I think the testimony competent." A motion having been made for nonsuit, the subject was again referred to: "The Court: I think I will let the jury pass on the matter. I understand the suit is for punitive, vindictive damage. Mr. Trantham: And such actual damages as we have proved. The Court: Do you allege any allegation of actual damages? Mr. Trantham: No, sir. The Court: I think you are confined to punitive damages."

It cannot be denied that plaintiff's attorney stated to the court the complaint did not contain any allegation of actual damages, yet he insisted throughout the case the plaintiff was entitled to recover such actual damages as he had proved. The reasonable explanation is that Mr. Trantham, in his answer to the court as to the character of the complaint, meant that he had not specifically pleaded actual damages, but considered the complaint would sustain a recovery of such damages under the act of 1898. It would be a very harsh rule to hold either client or counsel strictly bound by every remark made by counsel on the spur of the moment in the heat of combat, unless there is reason to suppose such remark or apparent concession was acted on by the other party to his prejudice. A careful examination of the record does not disclose that defendant omitted to defend against the claim for actual damages on account of the remarks of Mr. Trantham. On the contrary, the defendant examined a number of witnesses who were present when the accident occurred, and who undertook to give all the facts and circumstances connected with it. In addition to this, at the close of the testimony, defendant was fully advised, by the plaintiff's fourth request to charge, that he claimed actual, as well as punitive, damages; and, if he had been misled, he then had the opportunity to apply to the court for leave to offer additional testimony and argument. The third, fourth, and fifth exceptions are sustained.

Inasmuch as we have found the complaint is insufficient to sustain a recovery for actual, as well as punitive, damages, for the reasons above stated, it is not necessary to consider the sixth exception, in which the position is taken that the use of the word "gross," in the fourth paragraph of complaint, though in connection with the words "willful," "reckless," and "wanton," would support a claim for compensatory damages.

After the plaintiff had offered evidence to prove that he received the injuries of which he complained by an act of defendant, particularly described in this complaint, the

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defendant undertook to show, by its witnesses, that the accident occurred from an entirely different act. Upon the reply the plaintiff attempted to introduce further evidence on this issue. Such evidence would have been cumulative, and we see no ground to hold that the circuit judge did not properly exercise his discretion in excluding it. The first and second exceptions are overruled.

The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered.

STORY v. NORFOLK & S. R. Co.

(*Supreme Court of North Carolina, Sept. 22, 1903.*)

[45 S. E. Rep. 349.]

Passengers—Exclusion from Train—Evidence—Subsequent Intoxication.

A railroad company justifying its conductor in excluding a person from its train at a particular date on the ground of the person's drunkenness cannot show the person's conduct and condition on the conductor's train at a subsequent date.

Same—Same—Intoxication.*

A railroad company can refuse to admit on its trains a person who is drunk, though he has a ticket.

Same—Same—Exemplary Damages.*

Where a person had a ticket, and was sober, and offered to go on a train, and was refused, he was entitled to recover actual damages; and if the refusal was attended with undue force, calculated to humiliate him, or accompanied with malice or other willful wrong, the jury might award exemplary damages, but could not consider the fact that he or his family were at the time sick, unless the conductor knew of it at the time.

Same—Same—Wantonness—Insults—Evidence.

Where there was evidence that a person having a ticket was excluded from a train, that the person was quiet and orderly, and that the conductor rudely thrust him back in the presence of a large crowd, stating that he was drunk and a nuisance, and refused him passage, an instruction that there was no evidence of wantonness, insult, or other aggravation was properly refused.

Same—Same—Prior Misconduct.

Under Code 1883, § 1963, requiring railroad companies to take and discharge passengers at the usual stopping places on payment of fare, a railroad company cannot exclude a person from its trains because on other trains he had been offensive and troublesome to other passengers.

Appeal from Superior Court, Perquimans County; Bryan, Judge.

Action by S. C. Story against the Norfolk & Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pruden & Pruden, for appellant.

W. M. Bond, E. F. Aydlett, and W. J. Leary, for appellee.

CLARK, C. J. The plaintiff, having purchased a ticket home, presented himself at the gate June 5, 1902, at Eliza-

*See preceding case and foot-note.

beth City, when the conductor opened it at the arrival of the train, about 10 a. m. The conductor refused to permit him to enter. The plaintiff testified that he put his hand on his breast and pushed him back, saying, "You cannot go;" that he told the conductor that he had his ticket, and that his family was sick and he was sick; that the conductor replied, "You are drunk, and cannot go;" that he was refused entrance to the cars, and was compelled to walk home 10 miles; that he was sick and had to sit down on the end of the cross-ties to rest, and did not get home until about 12 o'clock at night; that his feelings were hurt, and he was worried and humiliated; that there were over 100 people in the depot; that he was not drunk, and did not have a bottle in his hand; and that he had no money to hire any other conveyance home. Three other witnesses testified that they saw the plaintiff on the platform, and talked with him; that "he was not drunk, and showed no signs of being drunk, but was quiet and peaceable, and was so when he attempted to go to the train." The conductor testified that the plaintiff was drunk and staggering, and missed the gate the first attempt he made to enter; that he saw two quart bottles in the plaintiff's arms, with something in them; that he told the plaintiff, "I cannot let you go. You are a nuisance to my passengers. I have been troubled with you all that I intend to be;" that the plaintiff promised to behave, but he declined to admit him; that he did not touch the plaintiff, but just reasoned with him, and had no harm or feeling against him. The conductor also testified, over plaintiff's objection, that the plaintiff had been on the train several times before; that he was generally drunk when getting on the train at Elizabeth City, boisterous, abrupt, and profane, and passengers had complained, that on the day before he was on the train, and behaved badly. The chief of police said he saw plaintiff stagger, and three employees of the defendant testified that, from the appearance of the plaintiff, they thought he was drunk. There was other evidence more or less corroborative on both sides.

The defendant offered to ask another witness what was the plaintiff's conduct and condition on this conductor's train March 22, 1903, with a view of showing that he was drunk and disorderly, so that passengers left the train. This was properly excluded. The right of a conductor to exclude him from the train June 5, 1902, depended solely upon his condition at that time.

The court properly charged the jury that, if the plaintiff was drunk, then the defendant had a right to refuse to admit him on the train, and he could not recover any damages. Common carriers have a right, and in some cases it is their duty, to refuse one in that condition, both on account of the danger of injury to him, and his liability to become a nuisance to the other passengers.

Besides the parts of the charge not excepted to, and hence not sent up, the court charged: "If the plaintiff had a ticket, and was sober, and offered to go on the train, and was refused, he is entitled to recover the actual damages that he sustained; and if the refusal to allow him to go on the train was attended with undue force, or other aggravating circumstances, calculated to humiliate him or wound his pride, or undue force accompanied with fraud, malice, rudeness, or other willful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts;" and the defendant excepted. "That if you find from the evidence that the plaintiff was, at the time of his exclusion, really sober, and entitled to enter the cars, had his ticket, and presented himself, and was refused, then he would be entitled to recover only such actual damages as he sustained by the wrongful act of the conductor (unless the act was done with fraud, malice, undue force or insult), in which would be included such sum as he may have paid for his ticket, with interest thereon, together with the reasonable cost of reaching his home by some other route, and compensation for the extra time lost to him by the wrongful act of the conductor. In estimating the actual damages suffered by him, you will not consider the fact that he or his family was at the time sick, or any consequences growing out of that sickness, unless you find that the conductor knew of his physical condition at the time of his exclusion." This charge was given at the request of the defendant, and hence is not passed on by us, except the words found in parenthesis, which the court added, and to the addition of these words the defendant excepted.

The defendant requested the court to charge the jury as follows: "In this case there is no evidence of such fraud, malice, wantonness, insult, or other aggravation which will justify the jury in assessing punitive damages." Refused, and the defendant excepted.

There was evidence, which the jury evidently found to be true, that the plaintiff was not drunk, but quiet and orderly, and that though he had a ticket in his hand, entitling him to passage, the conductor rudely thrust him back in the presence of a large crowd, telling him he was drunk and was a nuisance, and refused him the passage he was entitled to, though he told the conductor he was sick and his family were sick, and causing him to walk 10 miles home, which he reached at midnight. The court could not, therefore, give the last prayer—that there was no evidence of "wantonness, insult, or other aggravation" justifying the assessment of punitive damages; and the charge above excepted to and the insertion in the last paragraph were not erroneous. *Purcell v. Railroad*, 108 N. C. 414 (third headnote), 12 S. E. 954, 956, 12 L. R. A. 113; *Hansley v. Railroad*, 117 N. C., at pages 569, 571, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; 3 Sutherland, Damages, §§ 535, 537.

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The defendant further requested an instruction "that if the plaintiff had before that time gone on the train of the defendant, and been offensive and troublesome to other passengers and to the defendant's employees, and this was known to the conductor, then he might consider that fact upon the occasion complained of, in deciding whether to admit the plaintiff on the train." This was also properly refused. That the conductor did consider the plaintiff's former conduct, and not his conduct on this occasion, was evidently the fault entitling the plaintiff to recover. A common carrier must treat all passengers alike. If the plaintiff, with a ticket, and quiet, sober, and orderly, presented himself for transportation on June 5, 1902, he had the same rights as any other person whatsoever in the same condition. Common carriers can establish no "habitual criminals" regulations. Code 1883, § 1963, is mandatory that railroad companies shall take, transport, and discharge passengers and property at the usual stopping places "on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises." That one offering himself as a passenger has on other occasions been disorderly and offensive on the train is reason why the conductor should be critical in scrutinizing his condition when he offers to enter, and more observant of his conduct when on the train, to prevent annoyance to passengers, but does not excuse him, if, by reason of the plaintiff's conduct on other occasions, he wrongfully refused him carriage when in proper condition and armed with a ticket.

The verdict of the jury (and we must take it that they found the facts correctly) seems to be that the conductor was prejudiced against the plaintiff by reason of his former conduct (for he says he told the plaintiff, "I have been troubled with you all I intend to be"), and wrongfully rejected him as a passenger, with rudeness, wantonness, and insult, thrusting him back, and charging him with being then drunk, in the presence of a large crowd, and unjustifiably causing him a 10-mile walk homeward, with a railroad ticket in his pocket. The moderate verdict (\$125) shows, too, that the jury considered all the circumstances of the case, and gave weight to the plaintiff's precedents in assessing the humiliation he suffered.

Conductors have many aggravations—almost as many, perhaps, as policemen—but both classes must, perforce, keep their equanimity when on duty. It is the function of neither to punish any one by any discrimination in the discharge of their duties to the public.

No error.

PEOPLE v. WADHAMS.

(Court of Appeals of New York, Oct. 6, 1903.)

[68 N. E. Rep. 65.]

Public Officer—Removal—Use of Railroad Pass.

Where a notary public accepts a free pass from a sleeping car company, and uses the same on the cars of said company, he is subject to removal for violation of Const. art. 13, § 5, prohibiting the use of free transportation by a public official.

Appeal from Supreme Court, General Term.

Action by the people of the state of New York against Frederick E. Wadhams to remove him from his office as notary public for having accepted and used a free pass from the Wagner Palace Car Company, in violation of Const. art. 13, § 5. From a judgment of the Appellate Term affirming the judgment for plaintiff, defendant appeals. **Affirmed.**

Frederick E. Wadhams, for the People.

John Cunneen, for respondent.

PARKER, C. J. We held in *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384, that a notary public is a public officer within the meaning of the provision of Const. art. 13, § 5, prohibiting a public officer or a person elected or appointed to public office under the laws of this state from receiving from any person or corporation, or making use of, "any free pass, free transportation," etc.; and necessarily, therefore, the conclusion was reached in that case that, the defendant having received and made use of a free pass over a railroad, the people could maintain an action against him to have his office adjudged to be forfeited. The difference between that case and this one is that the pass received by Rathbone entitled him to ride upon the lines of the corporation issuing the pass, while in this case the defendant paid his fare, but occupied a seat in a palace car belonging to another corporation, and did not pay for it, but instead presented to the conductor a pass issued by the Wagner Palace Car Company in the name of defendant, entitling him, without charge, to accommodations in the palace or sleeping cars of that company running over any railroad in New York state. Accommodations of this kind have come to be regarded as a necessity by a considerable portion of the traveling public, and, rather than not have the benefit of such accommodations, a substantial percentage of the traveling population pay for the privilege of enjoying them. We hold—and we think argument is not needed in support of the proposition—that a public officer who accepts the privilege of riding in a palace or sleeping car accorded to him by a pass such as was issued in this case accepts a free pass and free transportation, within the meaning of that portion of section 5 of article 13 of the Constitution which reads as follows: "No public

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officer, or person elected or appointed to a public office, or under the laws of this state, shall directly or indirectly ask, demand, accept, receive or consent to receive, for his own use or benefit, or for the use or benefit of another any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another."

It follows that the judgment ousting defendant from his office as notary public should be affirmed, without costs.

GRAY, O'BRIEN, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

, NASHVILLE, C. & ST. L. RY. v. CODY.

(*Supreme Court of Alabama, June 18, 1903.*)

[34 So. Rep. 1003.]

Bills of Lading—Variance.

Where, in an action against a carrier on a bill of lading, the complaint alleged the bill of lading in the form prescribed by the Code, the fact that the bill introduced in evidence contained special limitations of the carrier's common-law liability did not constitute a variance.

Actions—Stipulations—Instructions.

Where it was stipulated by both parties that the court might give a charge to the jury that if they believed the evidence they should find for plaintiff, or if they believed the evidence they should find for the defendant, as the court might deem proper under the law and the evidence, such stipulation operated merely as a waiver of the trial by jury, and was not intended to put the trial court in error on the ground of a conflict in the evidence.

Appeal from Circuit Court, Marshall County; J. A. Bilbro, Judge.

Action by A. J. Cody against the Nashville, Chattanooga & St. Louis Railway. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action was commenced in a justice of the peace court, and from a judgment on default against defendant an appeal was taken to the circuit court. In the circuit court a complaint was filed containing two counts. The second count, which sought to recover against the defendant as warehouseman, was, on motion of the defendant, stricken. The first count was in words and figures as follows: "The plaintiff claims of the defendant the sum of fifty dollars damages for the failure to deliver certain goods, to wit, one case of notions and one case of oil cloth, received by the defendant as a common carrier, to be delivered to the plaintiff at Albertville, Alabama, for a reward which defendant failed to deliver." The defendant pleaded the general issue, and upon issue joined upon this plea trial was had.

It was shown by the evidence that the goods which it was alleged in the complaint that defendant failed to deliver to plaintiff were shipped to the plaintiff at Albertville; that the bill of lading under which the goods were shipped contained special stipulations limiting the defendant's liability. The evidence for the plaintiff tended to show that he sent for the goods to the defendant's depot, and when plaintiff's agent demanded the goods some goods which were shipped to the plaintiff were delivered to said agent, but the goods involved in this suit were never delivered to the plaintiff or his agent. The evidence for the defendant tended to show that the goods which were shipped to the plaintiff were checked into the defendant's depot on January 30, 1901; that plaintiff was notified of the arrival of the goods on January 31, 1901, and that plaintiff sent for said goods on February 1, 1901; that all of the goods shipped to the plaintiff, including those involved in the present suit, were delivered to the plaintiff's agent when he demanded them; and that the plaintiff's agent gave a receipt to the defendant's agent for said goods.

The case was submitted to the court under the following agreement, which was signed by plaintiff's attorney and defendant's attorney: "In this case it is agreed that the court may give a charge to the jury that if they believe the evidence they will find for the plaintiff, or if they believe the evidence they will find for the defendant, as the court may deem proper under the law and the evidence, and enter, on the record, jury and verdict in accordance with the charge of the court as given." Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the general affirmative charge in its behalf. The defendant duly excepted to the giving of this charge, and also excepted to the court's refusal to give the general affirmative charge requested by it.

Oscar R. Hundley, for appellant.

McCord & McCord, for appellee.

DOWDELL, J. What was said in the case of N. C. & St. L. R. Co. v. Parker & Co., 123 Ala. 683, 27 South. 323, and here relied on by appellant for authority, as to a variance between the complaint and the proof, where the complaint was in Code form on a bill of lading, and the bill introduced in evidence contained special stipulations, was reconsidered and departed from by this court in the later case of L. & N. R. R. Co. v. Landers, 135 Ala. 504, 33 South. 482. It is quite apparent from the record that by the written agreement entered into by counsel for plaintiff and defendant after the conclusion of the evidence upon the trial for the court to charge the jury affirmatively for the plaintiff or defendant "as the court may deem proper, under the law and the evidence, and enter, on the record, jury and verdict in accord-

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ance with the charge of the court as given," it was not intended by counsel to put the trial court in error on the ground of a conflict in the evidence. There was a direct and palpable contradiction in the testimony as to the delivery of the goods sued for, which would have made it error to give the general charge in writing at the request of either party. The agreement entered into was a waiver of any right to except because of a conflict arising out of the evidence. It was, in effect, an agreement for the court to be substituted for the jury as to a finding on the facts, and to render its judgment accordingly. Counsel for appellant in argument admits that the cause was virtually submitted to the court without a jury.

We find no error in the record, and the judgment will be affirmed. Affirmed.

CARVEY v. DETROIT & M. R. CO.

(*Supreme Court of Michigan, June 30, 1903.*)

[95 N. W. Rep. 716.]

Carriers—Ejection of Passengers—Issuing Tickets—Custom—Evidence—Admissibility.

Where a passenger presents a ticket on which he is entitled to ride and is ejected, the carrier cannot show a custom to issue such tickets for certain days only, in the absence of any proof of knowledge of such limitation by the passenger or the purchaser of the ticket.

Error to Circuit Court, Bay County; Theodore F. Shepard, Judge.

Action by Edna Carvey against the Detroit & Mackinac Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

Pierce & Kinnane, for appellee.

MONTGOMERY, J. This is an action in which the plaintiff recovered damages for being ejected from the defendant's car. The evidence discloses that she boarded the defendant's regular passenger train at Bay City on the 27th of December, 1901, and presented the ticket on the following page.

The conductor refused to receive the ticket, and compelled her to alight, and she was obliged to walk back to her home, following the track, and carrying a heavy valise.

No question is made that this ticket, on its face, showed the plaintiff entitled to a ride on the train in question, but it was sought to show that it had been the custom of this railroad company and others to issue holiday tickets, good on the 24th and 25th of December for a going passage, and good to return until January 2d, and likewise tickets good to go on December 31st and January 1st, and good for a return on

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January 2d, and that published notices that such tickets would be on sale were given. It was sought to limit the contract which the ticket imported by this testimony. The undisputed testimony in the case shows that the person who purchased the ticket had no knowledge of this advertisement, or of any limitation of the ticket; nor was there any proposition to bring home definite notice to either the plaintiff or the purchaser of the ticket of any such limitation by custom. The testimony was rightly excluded. See *Keen v. Electric Railway Co.*, 123 Mich. 247, 81 N. W. 1084; *Huford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; *Frederick v. Railroad Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Thompson on Negligence*, vol. 3, page 20.

Judgment will be affirmed, with costs. The other Justices concurred.

DETROIT & MACKINAC RAILWAY CO.	
EXCURSION TICKET	
TURNER TO BAY CITY	
Good for One FIRST-CLASS Passage	
Only when Officially Stamped and Dated and	
Subject to the following Contract:—In consideration of this Ticket	
being sold at a reduced price from the regular full First-Class	
rate, it is hereby understood and agreed upon by the purchaser,	
that it will be good for passage only until	
January 2nd, 1902	
after which it will be void. No stop-over Checks	
will be given on this Ticket, it being good only	
for a Continuous Passage.	
Form 000	T. G. WINNETT, General Passenger Agent.

Perforated.

D. & M. R. Y. CO.	
EXCURSION TICKET.	
BAY CITY	
—to—	
TURNER	
VOID IF DETACHED.	
Form 000	

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reason that the defendants were sued as a copartnership, and that service of the writ was made only upon George S. Clark, agent of the defendants, and did not show that Clark was one of the copartners, such service not being authorized in this action. The motion to set aside the service was overruled. The defendants then moved to set aside the summons, on the ground that the names of the defendants were not set out in the complaint, and that the clerk of the court was not authorized to issue the writ in the form adopted. This motion also was overruled. The defendants thereupon entered a full appearance, and demurred to the complaint upon two grounds: Want of jurisdiction of the persons of the defendants, and the insufficiency of the facts stated to constitute a cause of action. The demurrer was overruled. An answer in five paragraphs was filed, the first paragraph being a general denial.

The second paragraph of answer stated, in substance, that the defendants conducted their business with the other express companies mentioned in the complaint under special traffic agreements, and that the Southern Indiana Express Company did not offer to pay the charges on the package offered by it for carriage, or to guaranty the payment of defendants' charges, or the repayment of the accrued charges if they should be paid by the defendants, nor did said Southern Indiana Express Company offer to put in force between it and the defendants an agreement as to through rating or express charges, and the division thereof, similar to the arrangements existing between the defendants and said other express companies. This paragraph concluded with the averment that if, under the act of March 7, 1901, the defendants could be required to receive the said package, pay the accrued charges for carriage thereof, and carry the package to its destination, the statute was invalid, in that it contravened section 8 of article 1, and section 1, of the fourteenth amendment of the Constitution of the United States, and sections 21 and 23 of article 1 of the Constitution of the state of Indiana.

The third paragraph of defendants' answer alleged that defendants were a joint stock association or copartnership, not organized under the laws of Indiana, usually called an "express company," and that defendants were regularly engaged, and had been since March 29, 1879, continuously, in the business of carrying money and property over and upon railroads in the state of Indiana, and agreeing to receive and receiving compensation therefor; that they were so engaged in said state before said date, when an Indiana statute in relation to foreign express companies (sections 3306-3308, Burns' Rev. St. 1901), whose title it quotes, was approved; that upon the taking effect of said act, and long before May 16, 1901, when the said Indiana act of that year took effect, defendants duly and fully complied with section 2 of said act of 1879, by exe-

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cuting and filing in the office of the recorder of said Jackson county the "agreement" mentioned in that section, authorizing process for defendants to be served upon their express agents, and authorizing judgment thereon in personam against the defendant copartnership in such actions, and in the manner as is provided in said section; that continuously since the filing of said agreement defendant had, in pursuance of the rights and privileges secured to defendant by said act of 1879, enjoyed such rights and privileges in the transaction of defendants' express carrier business in Indiana and in said Jackson county; that on the 15th day of May, 1901, at midnight of said day, the Secretary of State of the state of Indiana certified as then in force said Indiana statute so approved March 7, 1901, whose title the answer quotes; that defendants' acceptance of the provisions of said act of March 29, 1879, became a contract between the defendants and the state of Indiana, which was, on May 15, 1901, and still is, in force, unless said act of March 7, 1901, which attempted a repeal of said act of 1879, and attempted to annex conditions to defendants' right and privilege to transact their express carrier business in Indiana, different from those defined and authorized by the said act of 1879, be a valid statute of Indiana; that the right of the state to have and maintain this action rests wholly upon, and does not exist without, the provisions of said act of 1901; that that act is null and void because, under the facts pleaded, it violates section 10 of article 1 of the Constitution of the United States, in that it impairs the obligation of said contract between the defendants and the state of Indiana.

The fourth paragraph of answer averred that the defendants were a copartnership, an association of persons, usually called an "express company," and had been for five years in the business of carrying money and property over and upon railroads operated in Indiana and in said Jackson county, and receiving and agreeing to receive compensation for such carriage; that the Southern Indiana Express Company did tender to the defendants the express package mentioned in the complaint for continuance of its carriage from said city of Seymour to destination, but that said tendering company did not pay or offer to pay defendants' charges for such carriage, and did demand from these defendants said tendering company's accrued charges for carrying said package to Seymour, and thereupon defendants declined to receive and carry said package and to advance said accrued charges; that said Southern Indiana Express Company was then a corporation organized and existing under the laws of the State of Indiana, but was not a responsible express company, nor an express company of any kind, because there never had been a statute of Indiana authorizing the incorporation of express companies; that said company, by its certificate of incorporation and articles of association, de-

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clared itself to be organized "in pursuance of the statutes of Indiana relating to voluntary associations and corporations," which articles were filed June 22, 1898, in the office of the Secretary of State of the state of Indiana, and there was then but one statute authorizing the incorporation of "forwarding" companies, viz., subsection 15, § 1, of the voluntary association act of 1887, reading: "15. To organize forwarding and commission companies, and to own and operate wharf boats in connection therewith, upon any of the rivers within or bordering upon the state of Indiana" (Laws 1893, p. 291, c. 126); that said company was incorporated in pursuance of said subsection, and not otherwise; that it, in assuming to exercise the franchise of an express company common carrier, and to transact an express carrier business, especially touching the express package mentioned in the complaint, acted wholly ultra vires its charter.

The fifth paragraph of defendants' answer averred that defendants were a copartnership composed of natural persons; that the state's right, if any, to have and maintain this action rests wholly upon section 4 of the Indiana statute of March 7, 1901, whose title it quotes, and, without said section, that the state cannot maintain the action; that the penalty prescribed in said section, and the offense it denounces, are respectively of such character that any judicial proceeding in which a defendant might be convicted of the offense, and thereupon have inflicted upon him such penalty, is in fact and in law of a criminal nature, and within the terms of section 19 of article 1 of the Constitution of Indiana, which provides that in all criminal cases whatever the jury shall have the right to determine the law and the facts; that said section requires trials under it to be had as in civil actions, wherein the jury is the judge only of the facts; and that said section 4 is void because it is in violation of section 1 of the fourteenth amendment of the Constitution of the United States, in that it denies natural persons composing express partnerships the equal protection of the laws.

Demurrers to the second, third, fourth, and fifth paragraphs of the answer were sustained.

The cause was submitted to the court for trial upon the issue formed by the general denial, and, at the request of the defendants, the court made a special finding, with its conclusions of law thereon, which finding and conclusions were as follows: "(1) That the Adams Express Company is a copartnership and association of persons, whose individual names are unknown and could not be ascertained. (2) That said company, under the name of the Adams Express Company, is engaged in business in Jackson county, Ind., as an express company, usually so called, and as such express company carries and transports money, merchandise, and other articles over and upon certain railroads operated in the state of

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Indiana; among others, over and upon the Pittsburg, Cincinnati, Chicago & St. Louis Railroad, which operates through the city of Seymour, Jackson county, state of Indiana, directly north to the city of Indianapolis, in the state of Indiana. (3) That said Adams Express Company receives and agrees to receive compensation for said services in carrying and transporting such articles, and was so engaged on the 29th day of May, 1901, and for a long period prior thereto, without demanding compensation from the consignor in advance, but collecting and receiving it from the consignee. (4) That the Southern Indiana Express Company was, on the 29th day of May, 1901, a responsible express company, with a paid-up capital stock of \$50,000, with no liabilities, incorporated under the laws of the state of Indiana under said name. (5) That said Southern Indiana Express Company was, on the 29th day of May, 1901, engaged in carriage of money, merchandise, and other articles over and upon the railroad of the Southern Indiana Railway Company. (6) That the said Southern Indiana Railway Company operated its lines from the city of Terre Haute to the town of West Port, in the state of Indiana, through the city of Seymour, in Jackson county, Ind. (7) That the said Southern Indiana Railroad connected in the city of Seymour with the Pittsburg, Cincinnati, Chicago & St. Louis Railroad. (8) That on the 29th day of May, 1901, said Southern Indiana Express Company received at the station of Bedford, Ind., on the line of said Southern Indiana Railway, a package of merchandise of the value of \$5, addressed and consigned to R. M. Smock, of Indianapolis, Ind., in the usual course of its business, without requiring from consignor the prepayment of the charges for making such carriage. (9) That on the said 29th day of May, 1901, the said Southern Indiana Express Company, by its agent at the city of Seymour, Ind., tendered the said package, for continuance of carriage thereof to its destination at the city of Indianapolis, to the said Adams Express Company at its office and agency in the city of Seymour. (10) The said Southern Indiana Express Company tendered to defendant, at its usual place of business and agency in the city of Seymour, said package, and demanded that defendant receive said package and pay said Southern Indiana Express Company the sum of 25 cents, its charges, and transport the said package to the consignee at Indianapolis, collecting its [defendant's] charges (which were 25 cents), and charges advanced to the Southern Indiana Express Company from the consignee upon delivery of the package. All of which defendant refused to do. (11) That after said refusal to receive said package said Southern Indiana Express Company tendered the same to defendant, and demanded that it transport said package over its line to Indianapolis, collecting from consignee its charges for the same, which charges are 25 cents. That defendant refused

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to receive said package, but required of said Southern Indiana Express Company that it pay its charges for said transportation—25 cents—in advance. (12) That defendant and all other express companies had an established usage and custom by which they received goods, money, etc., from all consignors, including express companies, at said agency, and throughout the state of Indiana, without exacting prepayment of freight charges. That said custom and usage was denied to the said Southern Indiana Express Company. (13) That said Adams Express Company was on said date, and for a long time prior thereto had been, accustomed to and did receive, in its regular course of business, money, merchandise and other articles from persons, corporations, and other express companies, for carriage over its said line to the city of Indianapolis, without requiring prepayment of charges. (14) That said Southern Indiana Express Company demanded that said Adams Express Company receive and carry said package and deliver it to the consignee at the city of Indianapolis, Ind., where it had at said date an office and agency for the receiving and delivering express matter from and to persons and corporations of said city. (15) That the said Adams Express Company then and there had and maintained its line of transportation between said city of Seymour and the said city of Indianapolis over the said Pittsburg, Cincinnati, Chicago & St. Louis Railroad. (16) That the said Adams Express Company, upon said date, then and there refused to receive said package from the Southern Indiana Express Company, and refused to accept and complete the carriage and delivery thereof. (17) That on the said date, and long before the offering of said package to the said the Adams Express Company, a custom and usage had been established, and then and there existed, between the said the Adams Express Company, the American Express Company, the United States Express Company, the Wells-Fargo Express Company, the National Express Company, the Southern Express Company, and other express companies, with which it had and maintained business connections in said city of Indianapolis, and in the state of Indiana, to receive from each other, and to pay the charges of each preceding carrier and complete the carriage of, all said packages, the delivering carrier receiving from the consignee, and retaining, all charges of each and all preceding carriers for the carriage thereof. (18) That on and for ten years prior to the 29th day of May, 1901, the said Adams Express Company maintained an office and agency in the city of Seymour, where it received from all persons and corporations money, goods, and merchandise for transportation over its said express line and its connecting lines, without demanding prepayment of its charges, but collecting the same from the consignee. (19) That at the city of Seymour defendant and an express company, to wit, the United States

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Express Company, operating over the Baltimore & Ohio Southwestern Railroad, connected. That on the 29th day of May, 1901, and for 10 years last past, as an established custom and usage, the two said express companies had exchanged packages and express matter; the defendant, at its office in Seymour, receiving from said United States Express Company such goods and packages as are usually carried by express companies for transportation to points in its own line, without demanding, in advance, payment of its charges for transportation, but collecting the same from the consignee; and also at said office defendant was accustomed to receive, and by usage did receive, in the regular course of business at said office, express matter for transportation to points on its own line from the said United States Express Company, without prepayment of its freight charges, and paying to said United States Express Company its charges for the carriage over its own line, and collecting from the consignee the total amount of its charges so advanced and its own accrued charges. (20) That the said the Adams Express Company, by so refusing to receive and forward said package, did then and there refuse to grant the said Southern Indiana Express Company equal terms, facilities, accommodations and usages in the receipt, carriage, continuance of carriage, and delivery of said package to its destination at said city of Indianapolis, and thereby unjustly discriminated against the said Southern Indiana Express Company."

And, as conclusions of law upon the facts, the court found: "(1) That the Adams Express Company did then and there unlawfully refuse to grant to the said Southern Indiana Express Company equal terms, facilities, accommodations, and usages in the receipt, carriage, continuance of carriage, and delivery of property usually carried by express companies. (2) That the said the Adams Express Company did then and there and thereby unlawfully discriminate against the said Southern Indiana Express Company, in refusing to receive and deliver said package to the said R. M. Smock. (3) That the law is with the plaintiff, the state of Indiana, and entitles it to the relief prayed for in the complaint, and it ought to recover the sum of \$500."

A motion by the defendants for a new trial was overruled, and judgment was rendered on the finding.

The errors assigned are upon the rulings of the court on the motions to set aside the service of the summons, and the summons itself, the rulings on the demurrers to the complaint and answers, the several conclusions of law, and the denial of the motion for a new trial.

1. Section 2 of the act of March 29, 1879, entitled "An act in relation to foreign express companies," etc. (Acts 1879, p. 146; section 3307, Burns' Rev. St. 1901), provides that all such copartnerships, or associations of persons, joint-stock

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associations or companies shall file in the office of the recorder in each county in which their business is conducted, or where they may have an agency or office, a statement setting forth the name of such copartnership, association of persons, etc. Section 3 of the same act declares that all such copartnerships, associations of persons, joint-stock associations, or companies may sue and maintain suits, and be sued and defend suits, in and by the name set forth in the statement required to be filed and recorded by the said act. This provision is a general one, and applies not only to suits brought by citizens or residents of this state having claims against such copartnerships, etc., engaged in the business of common carriers as express companies, arising out of transactions in this state with any agent or employee of such copartnership, etc., referred to in section 2 of the act, but to all other actions, however arising, in which the copartnership, etc., is either the plaintiff or the defendant. It is by virtue of this section alone that an unincorporated association of this character can maintain an action in the courts of this state in its trade name. Under these two sections, the appellant was described as a copartnership, under the name of the "Adams Express Company," engaged in the business of a common carrier, and was properly sued in its name of the Adams Express Company. The motions to quash the writ of summons, and to set aside the service of the same, were properly overruled.

The act of 1879, *supra*, applies not only to foreign companies, but to all copartnerships, associations, joint-stock associations, or companies not organized or incorporated under the laws of this state, usually called express companies, engaged in the business of carrying or transporting money, merchandise, etc. In a suit against such a company by its trade-men, it is not necessary to allege that it has filed the statement required by section 2 of that act. If it has not done so, or, having filed a statement showing its trade-name, if it wishes to take advantage of the defense that it is sued by the wrong name, such defense should be set up by answer in abatement. *Peden v. King*, 30 Ind. 181; *McCrory v. Anderson*, 103 Ind. 12, 2 N. E. 211; *Louisville, etc., Ry. Co. v. Caldwell*, 98 Ind. 245, 249. The complaint alleged that the defendants were "a copartnership and association" engaged in the business of carrying money, merchandise, etc., in this state. This being the case, the persons so engaged in that business were bound to file, in the office of the recorder of each county where they had an office or agency, a statement of the name by which they were to sue and be sued. Without this they could not lawfully engage in business at all. The law presumes that persons so situated do their duty, and it was no more necessary to aver that these copartners had complied with the law and filed a statement of their trade-name, than it is to aver, in an action against a

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domestic corporation, that it has filed its articles of association in the proper public offices. *Walker v. The Shelbyville, etc., Co.*, 80 Ind. 452, 453, 454; *Heaston v. The Cincinnati R. Co.*, 16 Ind. 275, 278, 79 Am. Dec. 430; *Thompson on Corporations*, § 1825.

2. The first objection taken to the complaint is that the Southern Indiana Express Company, described in the pleading as "a responsible express company * * * incorporated under the laws of the state of Indiana," and to which the rights secured by the act of 1901 were alleged to have been denied, could not have had a legal existence, because there is no statute of this state under which a corporation for the purpose of doing business as a common carrier of goods over the railroads of this state, generally known as an express company, could be organized. The point is without merit. The act of 1879 declared all copartnerships, associations, joint-stock associations, and companies engaged in that business to be common carriers, and authorized them to carry on trade, and to sue and be sued, by the name adopted by such copartnership, etc. It was not necessary that such companies should be incorporated. If they attempted to incorporate, but failed for the reason that the statutes did not authorize such incorporation, they would nevertheless remain common carriers, competent to carry on business as such, and entitled to the protection of the act of 1901. The allegation that the Southern Indiana Express Company was "incorporated under the laws of the state of Indiana" may be rejected as surplusage. It was sufficient for the purposes of the complaint to allege that it was a responsible express company engaged in the business of a common carrier over the railroads of this state.

The object of the act of 1901, *supra*, was to prevent unfair or unjust discriminations by one express company or combination of express companies acting as common carriers in this state against any consignor or other responsible company engaged in the same business, and to secure to all consignors, including other responsible express companies, equal terms, facilities, accommodations, and usages in the receipt, carriage, continuance of carriage, and delivery of money and property usually carried by express companies. To this end the act prohibited the granting by such companies to any one carrier, class, or combination of carriers, any terms, credit, privileges, advantages, usages, accommodations, or facilities in the receipt, transmission, or delivery of express matter which they did not grant to all others.

The charge in the complaint was that the appellant had refused to receive and carry the package described, and to accept and complete the carriage and delivery thereof, to pay the charges of each preceding carrier, and to collect at the place of delivery the full charges for the transportation of

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the package, although it was its custom and usage at that point so to do with the American Express Company and other express companies. It is contended by counsel for appellant that the complaint did not show that the advantages or facilities which the appellant denied to the consignor named were those which were extended by the appellant to other express companies at that agency. The allegations of the complaint cannot be so understood. A particular custom and usage in such transactions between the appellant and other express companies was alleged, and the complaint charged that the appellant refused to receive and carry the package tendered by the consignor upon the terms established by such custom and usage. This was sufficient.

The validity of section 4 of the act of 1901 on which the action is founded, is attacked upon various constitutional grounds, but none of these objections can be allowed. The act does not violate section 22 of article 4 of the state Constitution, forbidding the passage of local or special laws for the punishment of crimes and misdemeanors. The section 4 of the act of 1901 in question does not make any breach of the statute a misdemeanor. It declares certain acts unlawful, and provides a penalty for every such transgression. But the recovery of the penalty must be by a civil action, and not by a criminal proceeding. In no event can there be imprisonment either for a violation of the act or for a failure to pay or stay the judgment for the penalty. In this respect the act stands upon the same footing as the blackboard act, the mortgage satisfaction act, etc. *State v. Indiana, etc., R. Co.*, 133 Ind. 69, 83-85, 32 N. E. 817, 18 L. R. A. 502; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *Judy v. Thompson*, 156 Ind. 533, 60 N. E. 270. Crimes and misdemeanors in this state are such wrongs of a public nature as are punished by criminal proceedings in the name of the state. The charges must be preferred, upon oath, in the form of an affidavit, information, or indictment. The process is a warrant, and it is served by arresting the person of the defendant. The punishment, in all except capital cases, is by fine or imprisonment or disfranchisement, or by two or more of these, and, whenever it is by fine only, the defendant stands committed until the fine is paid, or bail is entered. The provision of section 16 of article 1 of the state Constitution, that all penalties shall be proportioned to the nature of the offense, has reference to criminal proceedings; but, were it otherwise, we could not say that, in dealing with a subject involving such large and important public interests as the prevention of unfair traffic discriminations among themselves by common carriers, a penalty of \$500 was out of proportion to the nature of the offense against which it was denounced.

It is next insisted by counsel for appellant that as the consignor in this case was not entitled at common law to such an in-

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terchange of business as is described in the complaint, and the appellant had the right to demand prepayment of its charges, such right to demand or waive prepayment was property, and the statute, by depriving the appellant of the right to elect when and of whom it would demand prepayment of its charges, deprived it of this property without due process of law, and therefore violated the fourteenth amendment of the Constitution of the United States, and also section 22 of article 1 of the Constitution of this state.

A further objection urged by counsel is that the requirement of equal facilities, credited, etc., to all carriers, deprives express companies of liberty without due process of law.

The statute of May 15, 1901, was enacted by the Legislature in the legitimate exercise of its police power for the protection of the public welfare. The state Constitution itself declares (section 1, art. 1) that all free governments are, and of right ought to be, instituted for the peace, safety, and well-being of the people. If this is the chief end of a government which is carried on by and through the agency of laws, it follows that the Legislature may and must, from time to time, enact such measures as the well-being of the people of the state requires. Great interests which have grown up and which closely and seriously affect the commercial convenience and prosperity of all the people of the state—interests which, in their present form and dimensions were unknown to the common law—are both proper and necessary subjects of police protection, regulation, and control. It cannot be safely admitted that these vast and powerful agencies, by and through which a large part of the carrying trade of the people of the state is conducted, are beyond the control of the Legislature. The well-being of the people demands that they shall at all times be subject to the rein and curb of the law, and that their methods of conducting their business must conform to those principles of fairness and justice with which the interests of the public are inseparably bound up. The relations of such agencies to the public and to each other, and an authoritative declaration and definition of their duties and obligations, are clearly within the scope of legislative authority wherever important public interests are involved, and this principle applies whether such agencies are corporations, quasi corporations, or copartnerships acting as common carriers.

The purpose of the statute was to prevent express companies and other common carriers doing business in this state from unfairly and unjustly discriminating against other persons or corporations engaged in the same business, by extending to some carriers advantages and facilities which were denied to others. Of late years many important enactments of this character, state and federal, have been found necessary for the protection of the interests of the people. All rules, practices, customs, and usages designed to de-

stroy competition in business, or necessarily having that effect, are inimical to the public well-being, and were condemned by the common law. The act under examination belongs to that class of legislation which has been found necessary to prevent the destruction of competition, and the exclusive possession by a few of the great fields of industry and enterprise. It has never been denied that, in the exercise of the police power, property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away. As the public peace, safety, and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common-law rights of some of the citizens, or even deprives them of such rights. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Barber v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222; *Chicago, etc., Co. v. Wolcott*, 141 Ind. 267; *Parks v. State* (Ind. Sup.) 64 N. E. 862, 59 L. R. A. 190; *Cooley's Const. Limitations*, 594; *Black's Const. Law*, 298, 310; *Tiedman's Police Power*, 245, and cases cited in note 1; *Id.* 227.

In the case before us, we find no unlawful invasion of the constitutional rights of the appellant. The act compelled it to make no payment of the charges of any preceding carrier, nor to enter into any special traffic arrangements with it. Its just and reasonable requirement was that each carrier should extend the same facilities and advantages to all, and that it should discriminate against none. If a carrier agrees with another that it will pay the charges of the preceding carriers, such arrangement is entirely voluntary. The statute neither requires nor prohibits it. But the law does insist that the carrier shall receive and carry upon the same terms merchandise or other articles delivered to it by other consignors or express companies. *Central Union Telephone Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Central, etc., Telephone Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114. Neither did the law exact from the appellant obligations and duties not exacted from the Southern Indiana Express Company. It applied equally to both, and each could demand from the other the benefit of any and all facilities, customs, usages, terms, and credits which such other allowed to its most favored patrons.

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The objection that the act of 1901 is invalid because it interferes with interstate commerce is wholly unsupported. Besides, no such question is presented by the record. The package which the appellant refused to receive and carry was sent from Bedford, Lawrence county, in this state, and was to be delivered at Indianapolis.

The act of 1879 (Acts 1879, p. 146; Burns' Rev. St. 1901, § 3306 et seq.), in relation to foreign express companies, and requiring them, among other duties, to file a statement of the name and locality of the company, the amount of its capital, and an agreement authorizing suits to be brought against it in certain cases, did not give to companies complying with its requirements a vested right to carry on business subject only to the laws then existing and exempt from all future and further legislative control.

It is not necessary that we should consider separately the questions arising upon the demurrers to the answers. These pleadings, with the arguments of counsel supporting them, and the authorities cited, have received careful attention, but we found in none of them a sufficient defense to this action.

The several conclusions of law were in harmony with the views expressed in this opinion, and we are unable to say that any controlling finding of fact was not sustained by the evidence or was contrary to law.

For the reason stated elsewhere in this opinion, the court did not err in excluding the certified copy of the articles of association of the Southern Indiana Express Company, offered in evidence by the appellant.

We find no error. Judgment affirmed.

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(*Court of Errors and Appeals of New Jersey, June 22, 1903.*)

[55 Atl. Rep. 241.]

Injury to Passenger—Sudden Jerk of Train—Direction of Verdict for Defendant.*

A passenger on a railroad train, as he approached his destination, prepared to alight; and while standing inside of the car near the rear

*As to whether there may be a recovery for an injury sustained by a passenger while riding in a dangerous place, see note appended to *Walker v. Green* (Ky.), 14 Am. & Eng. R. Cas., N. S., 366.

Contributory negligence of passenger standing inside of steam railway car, see *Farnon v. Boston & A. R. Co.* (Mass.), 1 R. R. R. 96, 24 Am. & Eng. R. Cas., N. S., 96; note, 14 Am. & Eng. R. Cas., N. S., 458; *Burr v. Pennsylvania R. Co.* (N. J.), 16 Am. & Eng. R. Cas., N. S., 162; *Lane v. Spokane Falls & N. R. Co.* (Wash.), 14 Am. & Eng. R. Cas., N. S., 436.

As to liability of carriers for injuries to passengers from jerks and jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co.* (Mo. App.), 3 R. R. R. 584, 26 Am. & Eng.

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door, which was open, a violent jerk or start of the train threw him out of the car to the ground, and he was seriously injured.

Held, that it was not error to refuse a nonsuit at the close of the plaintiff's case, nor to refuse to direct a verdict at the close of the defendant's evidence.

Impeachment of Witness.

A written statement signed by a witness, if submitted to the jury, cannot be considered by it as affecting the credibility of any witness other than the subscriber.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by John K. Field against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bedle, Edwards & Lawrence, for plaintiff in error.

Benjamin M. Weinberg and Samuel Kalisch, for defendant in error.

VOORHEES, J. This suit was brought to recover damages for injuries received by John K. Field from a fall from the rear end of the train of the railroad company. The real questions to be reviewed on this writ of error are, should the plaintiff have been nonsuited at the close of his evidence? and should the court have ordered a verdict for the defendant at the close of the whole case?

The facts proved were that on the evening of the 4th of July, 1902, the plaintiff, with his wife and three children, entered a train of the defendant company in Hoboken to be

R. Cas., N. S., 584; Southern Ry. Co. v. Crowder (Ala.), 7 R. R. R. 150, 30 Am. & Eng. R. Cas., N. S., 150; Denny v. North Carolina R. Co. (N. Car.), 7 R. R. R. 146, 30 Am. & Eng. R. Cas., N. S., 146; Sweet v. Birmingham Ry. & Electric Co. (Ala.), 6 R. R. R. 784, 29 Am. & Eng. R. Cas., N. S., 784; Davis v. Seaboard Air Line Ry. (N. Car.), 6 R. R. R. 790, 29 Am. & Eng. R. Cas., N. S., 790; Corkhill v. Camden & S. Ry. Co. (N. J.), 6 R. R. R. 786, 29 Am. & Eng. R. Cas., N. S., 786; Illinois Cent. R. Co. v. Crady (Ky.), 6 R. R. R. 37, 29 Am. & Eng. R. Cas., N. S., 37; Baltimore & O. S. W. R. Co. v. Harbin (Ind.), 6 R. R. R. 956, 29 Am. & Eng. R. Cas., N. S., 956; Timms v. Old Colony St. Ry. (Mass.), 6 R. R. R. 783, 29 Am. & Eng. R. Cas., N. S., 783; Beringer v. Dubuque St. Ry. Co. (Iowa), 6 R. R. R. 872, 29 Am. & Eng. R. Cas., N. S., 872; Smalley v. Detroit & M. Ry. Co. (Mich.), 5 R. R. R. 618, 28 Am. & Eng. R. Cas., N. S., 618; Erwin v. Kansas, Ft. S. & M. Ry. Co. (Mo.), 4 R. R. R. 148, 27 Am. & Eng. R. Cas., N. S., 148; Sansom v. Southern Ry. Co. (C. C. A.), 1 R. R. R. 88, 24 Am. & Eng. R. Cas., N. S., 88; Wait v. Omaha, K. C. & E. R. Co. (Mo.), 1 R. R. R. 98, 24 Am. & Eng. R. Cas., N. S., 98; Chicago City Ry. Co. v. Morse (Ill.), 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215; Betts v. Wilmington City Ry. Co. (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602; O'Neil v. Lynn & B. R. Co. (Mass.), 2 R. R. R. 263, 25 Am. & Eng. R. Cas., N. S., 263; United Rys. & Elec. Co. of Baltimore v. Beidelman (Md.), 4 R. R. R. 662, 27 Am. & Eng. R. Cas., N. S., 662; Herbich v. North Jersey St. Ry. Co. (N. J.), 5 R. R. R. 255, 28 Am. & Eng. R. Cas., N. S., 255; Texas & P. Ry. Co. v. Gardner (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759; Frohriep v. Lake Shore & M. S. Ry. Co. (Mich.), 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532.

transported to Harrison. They secured seats in the last car of the train, the plaintiff being near the rear door of the car. As they approached their destination, he arose, walked forward to his wife and children, and notified them to prepare to alight. He then returned to the rear of the car, and, just as he reached the door, which had been left open, there was a violent jerk or start of the train, which threw him out of the door, and over the chain which connected the two iron guards on the last platform. He landed on his head between the rails of the track, received a cut six or seven inches in length, extending through the scalp to the cranium. The fall also produced concussion of the brain, and he was otherwise seriously injured. The plaintiff's testimony is the only direct evidence as to how the accident happened. His wife and two children confirmed his statements as to the violent start or jerk of the train. The railroad employees deny such start or jerk. No passengers other than the plaintiff and his family were produced as witnesses.

At the conclusion of the plaintiff's case, the counsel for the defendant moved for a nonsuit on the grounds that no negligence had been proved against it, and that the evidence produced would not justify submitting the case to a jury. This motion was properly refused. The defense offered by the defendant was that it was impossible for the plaintiff to have been injured in the way described by him; that its employees did not notice any jerk or violent start of the train; that a lantern was standing on the rear platform, under the chain over which the plaintiff claimed that he was thrown; and that this lantern was not displaced or moved. No witness was produced who saw the accident. The only positive evidence thereof was the plaintiff's testimony. When the whole evidence was in, the defendant's counsel moved for a verdict on the ground that there was no negligence proved against it, and that the plaintiff was guilty of contributory negligence. An issue of fact had been raised by the plaintiff's evidence, which made the submission to a jury necessary. It was clearly a jury case, and the motion for a verdict was properly refused, and we find no error in the ruling of the learned judge. *Consolidated Traction Company v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132; *Burr v. Pennsylvania Railroad Co.*, 64 N. J. Law, 30, 44 Atl. 845.

The only other assignment of error to be considered in the determination of this case is to the charge of the court as to a written statement signed by the wife a few days after the accident—that she thought her husband had, in attempting to alight from the train, miscalculated the distance in the darkness. She denied having known the contents of this paper when she signed it, and also denies the truth of the matter therein contained. The learned judge allowed this statement to go to the jury, but charged that it could only be considered in connection with the testimony given by the

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wife, but that it could not in any way affect the credibility of the husband's testimony. There was no error in this ruling.

The jury returned a verdict of \$2,500, which, on a rule to show cause, was reduced to \$1,500, and this writ of error is brought to set aside the judgment of the circuit court. No error appears in the record, and the judgment must be affirmed.

ILLINOIS CENT. R. CO. v. VINSON.

(*Court of Appeals of Kentucky, Oct. 14, 1903.*)

[76 S. W. Rep. 167.]

Carriers—Passengers on Mixed Trains—Operation of Trains.*

While it is the duty of a carrier operating a mixed train to use the highest degree of care practicable in the operation of such trains, it is not responsible for injury to a passenger from jerks or bumpings of the cars, usually incidental to such trains when operated with such care.

“Not to be officially reported.”

On rehearing. Denied.

For former opinion, see 74 S. W. 671.

HOBSON, J. It was the duty of the defendant in the operation of its train to use the highest degree of care that was practicable in the operation of mixed trains of that character, but it was not responsible for jerks or bumpings of the cars such as are usually incidental to such trains when operated with proper care. In traveling on a mixed train, the plaintiff assumed the risks usually incidental to such a train properly operated, and it was incumbent on him while on the train to exercise increased care for his own safety in proportion to the increased danger of that mode of travel. If the defendant failed to exercise proper care in the operation of the train, as above defined, and by reason thereof the plaintiff was injured while exercising such care for his own safety as may be ordinarily expected of a person of ordinary prudence situated as he was, as above indicated, the defendant is liable. But if the plaintiff failed to exercise such care, and but for this the injury would not have occurred, or if the injury was the result of one of the risks usually incidental to travel on trains of that character operated with proper care, the defendant is not liable. In lieu of instructions 2, 3, 4, 7, and 8, on another trial the court should instruct the jury as above indicated.

Petition overruled.

*As to the liability of carriers for injuries to passengers from jerks and jolts of trains or cars, see preceding case and foot-note.

SMITH v. MILWAUKEE ELECTRIC RY. & LIGHT CO.*(Supreme Court of Wisconsin, Oct. 20, 1903.)*

[96 N. W. Rep. 823.]

Injury to Street Car Passenger—Derailment—Defective Track—Speed.*

In an action for injuries to a passenger on a street car, evidence that the accident occurred at a curve in the track; that crushed rock had been permitted to remain on the rails; and that the motorman operated the car which was derailed at a speed of from 12 to 20 miles an hour, regardless of such conditions—was sufficient to justify a jury in finding that the derailment of the car was due to the motorman's negligence in running the same at too high a rate of speed, and to the negligence of the company in permitting crushed rock to remain on the rails as alleged in the complaint.

Vacation of Judgment.

The right of a trial court to set aside a judgment during the term of its own motion is not limited to judgments inadvertently entered, but extends to a final judgment which was the result of a series of erroneous rulings entered after deliberation.

Appeal from Circuit Court, Racine County; E. B. Belden, Judge.

Action by Louisa Smith against the Milwaukee Electric Railway & Light Company. From an order setting aside a judgment on a nonsuit and granting plaintiff a new trial on the court's own motion, defendant appeals. Affirmed.

Action to recover for injuries received by plaintiff by the derailment of one of defendant's cars while she was a passenger thereon. The negligence complained of was running the car at a speed of 18 to 20 miles an hour contrary to the ordinance of the city regulating the movement of cars, where the track was in a defective condition in that foreign material had been allowed by defendant to accumulate thereon and on the right of way. It was alleged that, "The careless and negligent manner in which the car was run, namely, at its high and unlawful rate of speed, and the failure of the said company to maintain its equipment in a safe and prudent

*As to the duties of a railroad company, as a carrier of passengers, with respect to its roadbed and track, see monograph appended to *Whipple v. Michigan Cent. R. Co.* (Mich.), 2 R. R. R. 774, 25 Am. & Eng. & R. Cas., N. S., 774; *Galligan v. Old Colony St. Ry. Co.* (Mass.), 6 R. R. R. 896, 29 Am. & Eng. R. Cas., N. S., 896 (material falling upon track from embankment).

As to the duties of a railroad company, as a carrier of passengers, with respect to the management of conveyances, see monograph appended to *Frohriep v. Lake Shore & M. S. Ry. Co.* (Mich.), 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532; *Griffin v. Southern Ry.* (S. Car.), 6 R. R. R. 758, 29 Am. & Eng. R. Cas., N. S., 758 (excessive speed on defective track); *Baltimore & O. S. W. R. Co. v. Harbin* (Ind.), 6 R. R. R. 956, 29 Am. & Eng. R. Cas., N. S., 956 (excessive speed around curve).

As to liability for injuries to passengers from jerks and jolts of trains or cars, see preceding case and foot-note.

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manner were the proximate causes of said plaintiff's injury."

The defendant answered admitting that its car was derailed at the time alleged in the complaint, and that plaintiff was a passenger thereon, and alleged that the derailment was caused by the malicious and wanton obstruction of its track by persons not in its employ or in any manner connected with the defendant and for whose conduct it was in no sense answerable.

There was evidence proving or tending to prove that plaintiff was injured by the derailment of the car; that at the time thereof the car was going at a speed of from 12 to 20 miles an hour and faster than the ordinance of the city permitted; that a large amount of crushed stone had been deposited by defendant between, along and upon its tracks, and that there was a curve in the track where the car left the same. There was no other proof of how the accident was produced.

At the close of plaintiff's case a motion for nonsuit was granted. Subsequently plaintiff moved the court to vacate the nonsuit and for a new trial, which, after due deliberation, was denied. Judgment was rendered accordingly. Thereafter, before the close of the term, without notice to the parties or their attorneys, the judgment and the previous orders were vacated and a new trial granted. Defendant appealed.

Kearney, Thompson & Myers (Spooner & Rosecrantz, of counsel), for appellant.

John W. Owen (Wallace Ingalls, of counsel), for respondent.

MARSHALL, J. (after stating the facts). The first proposition of appellant's counsel is stated by them thus: "The nonsuit was not erroneous, the plaintiff having alleged specific negligence as the cause of the accident, was bound to show such negligence, and that the accident was caused thereby. This she failed to do." From the argument of this branch of the case we gather the idea that counsel supposed that to warrant the jury in finding that the negligence complained of caused the derailment of the car they must have some direct evidence on the subject; that otherwise they would be left to conjecture merely. There is probably no principle better understood than that issuable facts can be established by indirect as well as by direct evidence. If the circumstances of the accident in this case, as the jury had a right from the evidence to believe them to be, were such as to raise a reasonable inference that the derailment of the car was caused by the way it was operated, combined with the faulty condition of the track alleged, then a fair jury question in regard to the matter was presented. Now, notwithstanding the argument of counsel and the evident uncertainty the trial judge labored under on the subject, it seems that the evidence tended strongly to prove the acts of negligence alleged, and that they caused the derailment of the car. Such evidence was

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to the effect that where the accident occurred there was a curve in the track; that there was crushed rock upon the rails, and that the motorman operated the car at a speed of from 12 to 20 miles per hour regardless of those conditions. One, it seems, has but to apply common understanding to such a situation—a jury must necessarily be allowed to do that—to see that the derailment of the car was probably caused by its being run too fast in view of the curve in the track and the presence upon the rails of crushed rock, and that the motorman in charge of the car might well have expected, had he given any thought to the matter, that the car might go off the track as it did. It follows that the nonsuit was improperly granted, and that if the court had power to vacate it on its own motion, and grant a new trial, appellant has no good ground for complaint.

It is insisted that the rule that a court of record has control over its judgments and orders during the term in which they are rendered and may, with or without a motion therefor, vacate any such order or judgment if justice seems to require it, should not be extended to a judgment or order deliberately entered affirming a prior decision made during the term. If there is any such limitation upon the rule we are not familiar with it. Counsel has not produced any authority that there is. This court, in common with others, has declared in the broadest language that a court possesses inherent authority to set aside any judgment or order entered by it through mistake, inadvertence or want of proper deliberation at any time during the term, and need not wait to have such power put in motion by the request of an interested party before acting. *Brown v. Brown*, 53 Wis. 29, 9 N. W. 790; *Hansen v. Fish*, 27 Wis. 535. In the last case cited the court said: "There can be no doubt of the power of the court to set aside a judgment inadvertently ordered, at the same term at which the judgment was entered," and "that the court may exercise that power on its own motion." It would be a violent infraction of that to hold that if a judge erroneously enters an order through mistake, inadvertence or want of proper deliberation, and follows it by a second order affirming the first, thereby repeating the error through want of proper consideration of the subject, he is then powerless to correct the mistake, however apparent the same may be. The full scope of the rule was indicated in *Brown v. Brown*, where it is said that, in the interests of justice the judge should be allowed to vacate any order made by him through mistake, inadvertence or want of deliberation, at any time during the term in which the error is committed. Obviously, it can make no difference with the application of that principle that the mistake to be corrected is the final one in a series of erroneous rulings.

The order is affirmed.

LESLIE v. JACKSON & S. TRACTION CO.

(*Supreme Court of Michigan, Oct. 6, 1903.*)

[96 N. W. Rep. 580.]

Injury to Passenger—Open Switch—Negligence—Question for Jury.*

In an action by a passenger for injuries sustained by reason of the car running through an open switch, the declaration alleged that defendant's negligence consisted in want of reasonable care, in not having the switch properly adjusted, in not keeping the implements used in adjusting it so that children and others could not improperly use them to move the switch, in running the car at a high rate of speed, and in failing to approach the switch with the car under control. It was shown that the switch was at a public place, where many children congregated; that it was not fastened; that it was opened by any one desiring to do so by the use of a bar left there by defendant; that the car approached the switch at a rate of 15 or 20 miles an hour; and that some one had thrown the switch open: *held*, that the evidence was sufficient to require the submission of the case to the jury.

Same—Same—Personal Injuries—Pleading and Proof.

In an action for injuries sustained by a passenger by reason of the car running through an open switch, the declaration alleged that plaintiff was thrown on the ground; that he was thereby bruised, hurt, and wounded, sustaining a concussion of the spine, and injuring the tissues and nerves in the gluteal region of the right hip, causing a wasting of the right leg, and the nerves, muscles, and tissues thereof, permanently disabling him from manual labor; that he suffered great pain and anguish of mind and body; and that he became sick, sore, lame, and disordered: *held* to authorize proof relative to neuritis of the sciatic nerve.

Damages.

Where, in an action for personal injuries, a pre-existing injury was shown, which was caused by plaintiff falling on ice, which had not prevented him from working, and which affected the hip joint and left leg, but not his back, an instruction that plaintiff could not hold defendant liable for the effects due to the former condition, or its growth or development, and that plaintiff was entitled only to such damages on account of decreased earning power as, in accordance with his former condition, the jury should consider just, properly and sufficiently stated the law.

Remarks of Counsel.

The remark of counsel, in his argument to the jury, that the witnesses for the adverse party were "cattle," though highly improper, does not constitute prejudicial error, where the court stated that he would not make such remarks, and where counsel thereupon retracted, and his associate stated that he did not think counsel intended to say the men were cattle.

Grant, J., dissenting.

Error to Circuit Court, Jackson County; Erastus Peck, Judge.

Action by Stephen W. Leslie against the Jackson & Suburban Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas E. Barkworth and Worrall Wilson, for appellant.

John F. Henigan (Charles A. Blair, of counsel), for appellee.

*As to the duties of a railroad company, as a carrier of passengers, with respect to roadbed and track, see preceding case and foot-note.

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MOORE, J. On June 18, 1901, plaintiff was a passenger on one of defendant's cars. The car ran through an open switch at the intersection of Page avenue and Railroad street. The plaintiff received severe injuries. He brought this suit, and recovered a judgment. The defendant brings the case here by writ of error. The negligence charged may be briefly stated: First, "want of reasonable care, in not having the switch properly set and adjusted, and in not keeping the implements used by its servants and employees in setting and adjusting the switches so that children and others might not get them and improperly use them, and that some child or other person took the implement and moved the switch; second, the failure to have the switch properly set and adjusted, and the running at a high rate of speed when the switch was adjusted for Railroad street instead of Page avenue; third, the failure to approach the switch with caution and with the car under control."

It is claimed there was no testimony that would warrant the submission of the case to the jury under any of these claims. Page avenue runs east and west. Railroad street runs in a northerly direction. Leading from Page avenue to Railroad street was a switch connecting the track on Page avenue with the track on Railroad street, which was constructed only a few rods on Railroad street. It is claimed by plaintiff that this switch is at a public place where a good many children, and especially boys, congregate; that it was not fastened; that it was opened and closed by the use of a small iron bar, which was habitually left by the employees of the road on the ground near the switch, where anybody who desired to do so could take it and open the switch; that upon the date in question the car approached this switch at a rate of 15 or 20 miles an hour; that some one had thrown the switch open, making a curve in the track, which fact the motorman did not observe, and, as a result thereof, plaintiff received severe injuries. This case was tried before the opinion was handed down in the case of *Noe v. Rapid Railway Co.* (Mich.) 94 N. W. 743. The facts disclosed in this case show a much greater degree of negligence than was disclosed in the case of *Noe v. Railroad Co.*, *supra*, and we think there was a case for the jury.

It is claimed the court erred in admitting testimony relative to the neuritis of the sciatic nerve, because it was not averred in the declaration. The averment is: "And thereby the plaintiff was then and there violently thrown to and upon the ground there, and was thereby greatly bruised, hurt, and wounded, and sustained a severe concussion of the spine, and the tissues and nerves in the gluteal region of the right hip were severely bruised and injured, causing a great wasting and shrinking of the right leg, and the nerves, muscles, and tissues thereof; and he has become permanently disabled from performing manual labor * * * from thence."

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hitherto, and has suffered great pain and anguish of mind and body, and will continue to so suffer in the future, and became and was sick, sore, lame, and disordered, and so remained for a long space of time, to wit, from thence hitherto," etc. We think the declaration was broad enough to admit this testimony under *Johnson v. McKee*, 27 Mich. 471, and *Montgomery v. Railway Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616; *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Beath v. Railway Co.*, 119 Mich. 512, 78 N. W. 537; *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797.

It is claimed the court erred in declining to give the following request: "The plaintiff is not entitled to recover for defects which existed before the accident, and your verdict must not ignore these conditions. Whatever effects in his present situation are due to such former condition, or its growth or development, plaintiff cannot hold defendant liable for; and, in awarding damages, if you should find that the negligence of the defendant is established, nothing should be allowed on account of any conditions which grow out of or connected with the former defects." The judge charged the jury upon that subject as follows: "In considering the question of damages, I instruct you that plaintiff is not entitled to recover for defects which existed before the accident, and your verdict must not ignore these conditions if you find such conditions existing. Whatever effects in this present situation are due to such former conditions, if any, or its growth or development, plaintiff cannot hold defendant liable for; and, in awarding damages, if you should find that the negligence of the defendant is established, nothing should be allowed on account of any conditions which grew out of, or are connected with, the former defects, if any. The plaintiff is only entitled to such damages on account of decreased earning power as in accordance with his former physical condition you considered just, and you are at liberty to disregard the depreciation thereof if you find it existed prior to the accident, arising out of the previous physical defects of the plaintiff." The pre-existing injury, and its nature and extent, are substantially stated in the following excerpt from the testimony of said plaintiff: "The injury occurred when I was fourteen years old, in Wood county, Ohio. It was caused by falling on the ice. I have not been prevented from working, as a result of that injury, since I have been here. * * * The injury affected my hip joint or leg. It was not my right leg. It was my left one. It did not affect my back. Of course, it was jarred in that joint. I didn't say that it threw me over when I got tired. I said I stood stooped to rest myself. Just changed my position the same as you would if you were tired. It was not because of weakness in my back." We do not think, under the proofs, there was any failure to properly state the law.

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One other question calls for attention. During Mr. Henigan's argument, he characterized some of the defendant's witnesses as cattle, to which Mr. Barkworth asked an exception. "The Court: I hardly think I would make those remarks. I would hardly class them as cattle. Mr. Henigan: I will retract that. Mr. Barkworth: I don't think the judge's remark cures the error. I don't want to waive my exception. Mr. Blair: I don't think Mr. Henigan intended to say the men were cattle." We are all agreed the remarks of counsel were highly improper, and deserved a much severer rebuke than was given by the trial judge. Witnesses attend court in response to subpoenas, and are entitled to consideration, instead of vituperation. If there is anything in the testimony of the witness which calls for criticism, it is always proper to make it, but it does not justify calling him opprobrious names. If counsel had any purpose in designating the witnesses as cattle, it must have been to prejudice the jury against them. If we were satisfied that purpose had been accomplished in this case, we should not hesitate to reverse it for that reason. We are of the opinion, however, that, with the average juror, language of this character is not likely to have the effect expected by the one who utters it. When taken in connection with what was said by the judge and by the counsel associated with the attorney who uttered it, we are not satisfied the occurrence worked harm to the defendant.

The other questions raised by counsel have been examined, but we do not deem it necessary to discuss them.

Judgment is affirmed.

HOOKER, C. J., and CARPENTER and MONTGOMERY, JJ., concurred.

JENNINGS v. UNION TRACTION CO.

(*Supreme Court of Pennsylvania, May 11, 1903.*)

[55 Atl. Rep. 765.]

Street Railroad—Injury to Passenger—Contributory Negligence.

Where a passenger on an open electric car signals the conductor to stop at a crossing before and after it had reached it, and the conductor does not heed the signal, and the passenger stands at the edge of the car with his face to the rear and an arm around a stanchion, and again signals the conductor when the car is in the middle of the block, and the car is then suddenly stopped with a jar, and the passenger is thrown out, he is guilty of contributory negligence barring recovery for the injuries received.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Michael Jennings against the Union Traction Company. Judgment for plaintiff, and defendant appeals. Reversed.

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Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Leaming and Russell Duane, for appellant.
John A. Ward, for appellee.

POTTER, J. From the testimony of the appellee in this case we learn that on September 19, 1897, between 6 and 7 o'clock p. m., he was riding as a passenger upon an open summer car of the defendant company. The seats ran cross-wise of the car, and he was seated at the extreme west side, as the car was running north on Eighth street, Philadelphia. Desiring to get off at Pine street, he attempted to signal the conductor to stop the car before it had reached the crossing of that street, and again after it had crossed. The conductor either did not see or paid no attention to his signals, and the car did not stop, but continued at a rapid rate on its way northward. Then the appellee rose from his seat, stood upon his feet at the extreme edge of the car, so close to it that he could put his right arm around the post or stanchion at the edge, and turned so as to face the rear of the car, and, standing in this position, called to the conductor to stop the car. It had entered upon the block, and the motorman did not stop until about half way through, when he stopped opposite the gate of the Pennsylvania Hospital. At or about the moment when the car stopped, the appellee fell from the car to the street, and sustained serious injuries. He claims that his fall was caused by an unusual jar or jolt in the stoppage of the car, and that this constituted negligence, upon which he based his action. The evidence upon the part of the plaintiff was that of himself and three passengers who were upon the car at the time of the accident. The plaintiff said that the car "stopped suddenly"; "stopped there very suddenly, and knocked me right over"; "he stopped the car very suddenly, and that is what knocked me off." Anthony Morley said that the car was running at a moderate rate of speed, but on cross-examination he said that the car might have run a car length and a half after the motorman began to slow down; also that "it was a very sudden stop." "He did not see any one inconvenienced or discommoded besides Mr. Jennings, and was not hurt any himself, although he was standing up." Louis Berger said that the plaintiff was thrown or fell off, and that the stopping of the car moved witness a few inches out of his seat. He did not see any one else who fell or was inconvenienced in any way except plaintiff. Henry McGinnis said that the car was going "pretty rapid." "The bell was rung very sudden, and the car stopped very sudden." "It stopped with a jar; a very heavy jar." Plaintiff fell off the car. The stopping of the car jolted witness. His head went forward about six inches. The stop was "very sudden," "right sudden," "pretty sudden." After the brakes were applied, the car might have

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run half its length, or a little more. Some passengers complained about the sudden stoppage.

This was the substance of the entire testimony to sustain the plaintiff's allegation of negligence. We leave out of consideration the testimony on the part of the defendant, which was strongly to the effect that there was no unusual shock or jar in the stopping of the car, and that the appellee got down on the running board, and stepped off backward, before the car came to a stop. But, turning solely to the evidence on behalf of the plaintiff, does it disclose any negligence on the part of the defendant company? The plaintiff urgently requested the conductor to stop at once when he saw it had crossed Pine street. To emphasize his demand, he stood up. If he had remained sitting in his seat, and had been thrown from it, or from the car, or had been injured by the sudden stop while on the car, he would undoubtedly have had a good cause of action. Or if the car had been crowded, and there had been no vacant seat, he would have been justified in standing. But there was plenty of room. He had the whole seat to himself. Instead of remaining in it until the car stopped—as the notices and rules of the company, with which he was familiar, required him to do—he rose, and stood upon his feet at the extreme edge of the car. True, he put his arm around the post, but the result showed that his hold was insecure, and afforded him no protection. In response to his imperative demand to stop the car, the conductor obeyed, and gave the signal, and the very thing which the appellee demanded was done, and the car was stopped; but, as he says, suddenly, and with a heavy jar. But he had demanded an unusual thing—the immediate stopping of the car in the middle of a square; and, while other passengers may not have anticipated any such thing, yet he, having demanded the stopping of the car then and there, was bound to expect that the car would, in consequence of his emphatic demand, stop with some celerity. However sudden the stoppage was, it was not sufficient to injure any of the passengers who were seated, or even a passenger who was standing with his face towards the front of the car. If the jar of the stoppage caused the fall of the plaintiff, as he testified, it must have been because he was not seated, as he should have been at that particular time and under the circumstances, but was standing with his face to the rear of the car, and at the extreme edge of it, at the moment when, in response to his repeated and urgent request, and when as he knew, or ought to have known, the car was about to be brought to a standstill. Can the motorman be said to be guilty of negligence for bringing his car quickly to a stop in response to the demand of the appellee because his doing so disturbed the balance of a passenger who was standing with his back to the front of the car, and upon its extreme edge? We do not see that the motorman

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had any reason to anticipate that any passenger would place himself in such a position. Unless it is the duty of a street railway to stop its cars in such a manner that persons standing up and riding backwards shall not be jolted off their equilibrium, there is no negligence shown in this case. It is common knowledge that the momentum of a heavy moving car cannot be quickly overcome, as the appellee required should be done in this case, without producing something of a jerk. It is for the purpose, among others, of guarding passengers against danger from this cause, that the notices are posted requesting passengers to keep their seats until the car stops.

We are unable to see in the undisputed facts of this case any cause for the very regrettable accident to the appellee, other than his exposure of himself to an entirely needless risk. Under this view we are of opinion that the defendant was entitled to a binding instruction in its favor, as requested in its third point for charge.

The specification of error is sustained, and the judgment is reversed, and is now entered for the defendant.

MESTREZAT, J., dissents.

CASSADY v. OLD COLONY ST. RY. CO. (two cases).

(*Supreme Judicial Court of Massachusetts, Plymouth, Sept. 3, 1903.*)

[68 N. E. Rep. 10.]

Electric Cars—Injuries to Passengers—Burning of Fuse—Negligence.

The ordinary burning out of a fuse used to prevent an excessive amount of electricity to enter the motors of electric street cars is not prima facie evidence of negligence in an action for injuries to a passenger alleged to have been caused thereby.

Same—Same—Same—Same—Sufficiency of Evidence.

In an action for injuries to a passenger on an electric street car by fire alleged to have been caused by the burning out of a fuse, the expert evidence on both sides showed that the report, flash, and vapor-like puff attendant on the burning out of a fuse in proper condition was instantaneous and harmless. Other evidence established that the fuse on the car in question was located directly under plaintiff's seat, and that the burning thereof was attended with a flame lasting a few seconds, which partly enveloped plaintiff, and burned her face and clothing; while other witnesses testified that they noticed only the smoke, and no flame: *held*, that a verdict finding that the flame was not the instantaneous and harmless flame which results from the ordinary burning out of a fuse in proper condition; that the fuse was therefore defective, and that the company was guilty of negligence in placing the fuse where it was, was not contrary to the evidence.

Same—Same—Same—Same—Res Ipsa Loquitur.

Where, in an action for injuries to a passenger on a street car from the burning out of a fuse, there was evidence which would have warranted the conclusion that the duration and intensity of the flame produced by the explosion was greatly in excess of that which would have been the result if the fuse had been in proper condition, and

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that the improper condition of the fuse could have been discovered by the use of reasonable care, an instruction that the doctrine of *res ipsa loquitur* did not apply was properly refused, since how far negligence could be inferred from the accident itself under such circumstances was for the jury.

Same—Same—Same—Res Ipsa Loquitur—Waiver.

In an action for injuries to a passenger on an electric car by the burning out of a fuse, plaintiff's unsuccessful attempt to prove by direct evidence the precise cause of the burning out of the fuse did not estop her from relying on the doctrine of *res ipsa loquitur*.

Exceptions from Superior Court, Plymouth County.

Actions by one Cassady against the Old Colony Street Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions overruled.

Geo. R. Swasey and Thos. H. Buttimer, for plaintiff.

Henry F. Hurlburt and Damon E. Hall, for defendant.

HAMMOND, J. The first ground of defense is that there was no evidence of negligence of the defendant. It is conceded that the fuse burned out, but the defendant contends that the burning out of the fuse is not negligence *per se*, nor does it import negligence. The box containing the fuse was fastened to the sill of the open car, at a place directly underneath the portion of the seat upon which Mrs. Cassady was sitting. A fuse consists of a piece of metallic alloy, similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the "terminals," and they are so cut that they can easily be slipped under the thumb screws and clamped in place. The fuse and thumb screws are held in what is called the "fuse box." A wire leading from one thumb screw up through the roof of the car to the trolley wire conducts the electricity from the trolley wire to the box. From the other thumb screw there is a wire leading to the motors. When the two screws are connected by the fuse, there is a direct path for the electricity from the trolley wire to the motors. The purpose in using the fuse is to protect the wiring and the motors from an excessive current of electricity. It is constructed to withstand something less than the maximum current which the wires and motors are capable of carrying. When the current of electricity exceeds the maximum strength of the fuse, the metallic alloy melts with more or less of a report and flame, and, the electrical path between the trolley wire and motors being thereby broken, the wire and motor are saved from possible harm. As the safety valve in a locomotive engine allows the escape of steam when the pressure is too strong for safety or for the ordinary operation of the engine, so in electric cars the fuse is used to prevent the electrical mechanism from injury which might otherwise arise from the variations in the electrical current, which are practically unavoidable in the operation of the trolley cars.

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A fuse of the character above described is in general use upon cars run by electrical power. It is a safety device, and the evidence in this case shows that, in view of the rapid action of electricity, the practical difficulty of controlling it at all times, the inability of the motorman to ascertain the amount of power upon the wires or on the motors, the variable weight of the load to be carried, the reasonably necessary conditions of the traffic as to weight of machinery and cost of transportation, it is a proper device. It is intended to prevent harm to the machinery which otherwise might result from the practically unavoidable fluctuations of the power. The fuse is expected to burn out when, for any cause, the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped such an event is liable often to happen without negligence upon the part of any one. When, therefore, a fuse burns out, it cannot be said that the connection between the occurrence and negligence is such as, in the absence of other evidence, to justify the conclusion that the result was due to negligence. As well might it be said that the escape of steam from the safety valve of a locomotive engine momentarily stopping at a station is evidence of negligence. The ordinary burning out of a fuse, therefore, is not *prima facie* evidence of negligence; and, if there had been nothing else in this case, the defendant would have been entitled to a verdict.

But the jury may properly have found that there was something else in this case. The expert evidence on both sides showed that the report, flash, and vapor-like puff attendant upon the burning out of a fuse like this when in proper condition are instantaneous and harmless, and no physical injury, either by burning or by an electrical shock, could be expected to result therefrom. The evidence for the plaintiff tended, however, to show something more than a mere instantaneous, harmless flash. Upon this Mrs. Cassady testified as follows: "I was sitting on the car, and all at once a large flame of fire, or a blaze, came all over me, and I sprang off my seat, and started to go out of the car on the other side of the car, and a lady prevented me, and pushed me back, and that's the last I remember until about three weeks afterwards, when I found myself in bed." Her daughter, who was seated a few seats in the rear of the one upon which her mother sat, testified that she "saw a flash of fire come into the car right over my mother on the left-hand side; and she sprang away from it. * * * The flame seemed to come up and over her—to come from under the seat. The duration of the flame was a few seconds." She could not tell how long it lasted, but it was long enough for her "to see it plainly come in the car and flash right over" her mother. "The flame only partly enveloped" the person of her mother. "I should say it came over half of her face

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and body." Again, she says, "As the car started up the hill, there was this flash and flame." "I saw this flash and flame come up around or near my mother." Henry O. Rideout, a witness called by the plaintiff, testified that at the time of the accident he was driving a two-seated carry-all, and that he "saw a flame and smoke come out of the car ahead." He continued: "It might have been a flame of three or four seconds duration. It came up over the side of the car. Seemed to come from underneath, I don't know where. I was too far away to tell. * * * I was probably a hundred yards behind the car at the time. I was on the same side the car that the flame was. * * * I noticed the flame more than I did the smoke. I can't say from where I was, whether the flame went inside or within the car." Henry A. Rideout, another witness called by the plaintiff, testified that he was the father of the preceding witness, and at the time of the accident was driving in a team ahead of his son; and continued: "I saw a flash of light. * * * The car was ahead of me. I was driving towards it, and was about the length of this room from it. I simply saw a flash of light, and then I had to attend to my horse. * * * It was quite a flash of light come out near the front end of the car, I thought. My horse saw it, and, of course, shied, and I had to pay more attention to the horse." "I don't recollect seeing any smoke." As to the witnesses called by the defendant, one Thompson testified that he was sitting directly opposite the female plaintiff; and continued: "As the car was going, the fuse blew out. * * * There was a kind of a puff, and there was some smoke kind of come into the car. Looked to me like smoke. Everybody jumped. I jumped. There was this smoke, and, I suppose, flame, together; but I didn't notice much flame." On cross-examination he said: "My clothing was not burned, and I never told anybody that it was. It might have been scorched. I smelled the scorch of it." One Hunt, who was seated by the side of the preceding witness, did not notice any smoke, vapor, or flame. The conductor of the car testified that at the time he was standing on the running board on the right-hand side of the car, at about the fifth seat from the front, collecting fares; heard a slight noise; did not turn around instantly, but soon turned, and saw no flame, but only "a slight vapor." One McPhee testified that he was about 400 or 500 feet behind the car at the time the fuse burned out. The first thing which attracted his attention was the stopping of the car, and he saw no flash or flame. So much as to the testimony of the witnesses as to what they saw at the time.

There was evidence also tending to show that the flame existed long enough to burn. The jury may have believed that holes were made by the flame in the veil worn by Mrs. Cassady at the time of the accident. The daughter testified that she went to her mother while in the car immediately

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after the accident, and that she then noticed that little red blotches were breaking out all over her mother's face; that, while bathing her mother's face a few hours afterwards at home, she noticed a "fine red mark about an inch or an inch and a half long," near her mother's left eye, and that her eyebrows appeared as if they had been "scorched or burned off," and that there was a very slight appearance of scorching of hair elsewhere near the face. Margaret Pierce, called by the plaintiff, testified to the existence of "red marks or spots" on the left side of the eye, and just above the eye, and to the scorched appearance of the eyebrows and hair. The evidence as to these spots and marks was confirmed by several other witnesses. The plaintiffs contended that these holes in the veil, these spots and marks upon the face, and this scorching of the eyebrows and hair were caused by the flame. It is true that the expert testimony for the defense tended to show that there could have been no such flame, and hence that there could have been no such burning; but an irreconcilable conflict between what eyewitnesses say they saw and what expert witnesses say could not have happened is not unusual in the trial of causes, and within reasonable limits the jury may decide upon which they will rely. The jury, upon the evidence, may have found that the flame in this case was not the instantaneous and harmless flame which results from the burning out of a fuse when in proper condition; that the burning of this fuse was attended with unusual results, which would not have occurred if the fuse had been in proper condition; and that the most reasonable conclusion was that, if proper care had been exercised, there would have been no such flame. We cannot say that such a conclusion was not warranted by the evidence.

Moreover, there is another feature in this case of some importance. This was an open car, and this fuse box was placed directly under a seat intended for passengers, so that if, for any reason, there should be a harmful flame resulting from the burning out of a fuse, it might be reasonably apprehended that it would reach and injure a passenger. While, therefore, the mere burning out of a fuse properly located and in proper condition does not of itself import negligence on the part of the defendant, still, if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers. It would be something like arranging the safety valve of a locomotive engine so that the escaping steam might reach a passenger in his seat. Upon the whole, we think that the plaintiff had a right to go to the jury on the question of the negligence of the defendant.

It is very strongly urged by the defendant that in a case like this the doctrine of *res ipsa loquitur* does not apply, and in its sixteenth request it asked for an instruction to that effect. The court instructed the jury that the mere fact that

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the accident occurred is not in and of itself, as matter of law, prima facie evidence of negligence, and continued as follows: "That is, you cannot assume, just because an explosion may have occurred, in connection with the testimony in this case and the procedure in this case, that that is of itself negligence as matter of law. I cannot instruct you, as matter of law, that you are to find that prima facie evidence of negligence. But it is some evidence of negligence. It is for you to consider that as evidence tending to show negligence, but it is a question of fact for you to decide how far that shows negligence." There was no error in refusing to give the ruling requested. There was evidence, as above stated, which would warrant the conclusion that the intensity and duration of the flame produced by this explosion was greatly in excess of what could have been the result if the fuse had been in proper condition, and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. Such being the case, the defendant was not entitled to the ruling requested. And the jury were properly instructed that the matter was before them to decide how far negligence could be inferred from the accident itself. If the defendant desired to call the attention of the court to the precise phase of the testimony where the principle would not apply, it should have done so more distinctly.

The defendant also contends that, even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in *Winship v. New York, New Haven & Hartford R. R.*, 170 Mass. 464, 49 N. E. 647, and *Buckland v. N. Y., N. H. & H. R. R.*, 181 Mass. 3, 62 N. E. 955, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it.

The defendant strenuously contends that there was no evidence of physical injury, either by the flame or by electricity, and that the sufferings of the plaintiff were due simply to fright. It would not be profitable to recite further in detail the evidence bearing upon this question. The charge to the jury was sufficiently full and clear upon this point, and,

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while a decision for the defendant might reasonably have been expected, still we cannot say that the jury could not find upon the evidence that the plaintiff was physically injured by the flame or electricity, or both combined.

It was within the discretion of the court to allow the question to be put to Morse the expert, concerning the possibility of an electric shock.

No error appears in the manner in which the court dealt with the requests of the defendant.

Exceptions overruled.

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(*Court of Appeals of Kentucky, Oct. 8, 1903.*)

[76 S. W. Rep. 145.]

Injury to Passenger—Sudden Switch of Car—Contributory Negligence—Riding in Baggage Car.

Where the custodian of a lunatic, on his way with her to the asylum, was permitted to ride with her in a railroad baggage car by the conductor, by reason of the fact that the door of the passenger car was not sufficiently wide to permit the carrying of the lunatic into the car in an invalid chair, and such custodian was injured by being thrown from a tool box on which he was seated by a sudden lurch of the car, the fact that he was riding in the baggage car was not of itself such contributory negligence as relieved the carrier of any responsibility for his safety.

Same—Same—Negligence.

Where the custodian of a lunatic and his party were permitted by the conductor to ride in the baggage car of a mixed train, and such custodian was injured by a sudden jerk of the train, whether the jar or jerk was unusual or unnecessary in the operation of such a train was for the jury.

Carriers of Passengers—Degree of Care.*

A carrier of passengers on a freight train is only bound to exercise the highest degree of care and diligence consistent with travel on such train.

*As to the degree of care required of a carrier of passengers, see monograph appended to *West Chicago St. R. Co. v. Tuerk* (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1; *Southern Ry. Co. v. Crowder* (Ala.), 1 R. R. R. 70, 24 Am. & Eng. R. Cas., N. S., 70 (freight trains); *Western Maryland R. Co. v. State* (Md.), 6 R. R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904 (drover on freight train); *Atlanta Ry. Co. v. Reeves* (Ga.), 6 R. R. R. 870, 29 Am. & Eng. R. Cas., N. S., 870 (street railways); *Brunswick & W. R. Co. v. Ponder* (Ga.), 6 R. R. R. 45, 29 Am. & Eng. R. Cas., N. S., 45; *McAllister v. People's Ry. Co.* (Del.), 6 R. R. R. 957, 29 Am. & Eng. R. Cas., N. S., 957; *Larkin v. Chicago & G. W. Ry. Co.* (Iowa), 6 R. R. R. 852, 29 Am. & Eng. R. Cas., N. S., 852; *Baltimore & O. S. W. R. Co. v. Harbin* (Ind.), 6 R. R. R. 956, 29 Am. & Eng. R. Cas., N. S., 956; *Fewings v. Mendenhall* (Minn.), 6 R. R. R. 422, 29 Am. & Eng. R. Cas., N. S., 422; *Galligan v. Old Colony St. Ry. Co.* (Mass.), 6 R. R. R. 896, 29 Am. & Eng. R. Cas., N. S., 896; *Herbert v. St. Paul City Ry. Co.* (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152; *Southern Ry. Co. v. Roebuck* (Ala.), 2 R. R. R. 204, 25 Am. & Eng. R. Cas., N. S., 204; *Clerc v. Morgan's Louisiana & T. R. Co.* (La.), 4 R. R. R. 690, 27 Am. & Eng. R. Cas., N. S.,

Chesapeake & O. Ry. Co. v. Jordan**Elements of Damages.**

In an action for personal injuries, plaintiff is entitled to recover such damages as will compensate him for the physical and mental pain suffered from the injury, and for any permanent diminution of power to earn money occasioned by the injury, not exceeding the amount demanded in the complaint.

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Action by M. F. Jordan against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

W. H. Wadsworth, for appellant.

H. C. Sullivan, A. O. Carter, and John W. Woods, for appellee.

BARKER, J. On the 23d day of May, 1900, the appellee, Marion F. Jordan, was assisting James Skeens, a constable, in conducting a female lunatic to the asylum in Lexington, Ky. The party consisted of James Skeens, Marion F. Jordan, Alice Dalton, and the lunatic. They took passage at Fuller's Station on one of appellant's trains, which consisted of a large number of freight cars and two passenger coaches, such as is commonly known as a "mixed train." The lunatic was carried, sitting in a large invalid chair. Appellee's party took passage in the baggage car, which on this particular train was the forward half of one of the passenger coaches, the baggage department being divided from the passenger by a partition. As to why the party went into the baggage end of the car, instead of the passenger part, the evidence is somewhat conflicting with respect to the words spoken, but we do not believe that the variance is material. The evidence for appellee tends to establish that his party were either ordered or directed to go in the baggage car by the conductor. On the other hand, appellant's testimony tends to establish the fact that the conductor only required appellee and his party to go into the baggage car because they insisted on carrying the lunatic in the invalid chair, which was too large to enter the door of the passenger part of the car. Certain it is, however, that the conductor permitted

690; *Knauss v. Lake Erie & W. R. Co.* (Ind.), 4 R. R. R. 170, 27 Am. & Eng. R. Cas., N. S., 170; *St. Louis S. W. Ry. Co. of Texas v. Campbell* (Tex.), 4 R. R. R. 425, 27 Am. & Eng. R. Cas., N. S., 425; *Williams v. International & G. N. R. Co.* (Tex.), 3 R. R. R. 779, 26 Am. & Eng. R. Cas., N. S., 779; *Erwin v. Kansas, Ft. S. & M. Ry. Co.* (Mo.), 4 R. R. R. 148, 27 Am. & Eng. R. Cas., N. S., 148 (freight trains); *Le Blanc v. Sweet* (La.), 2 R. R. R. 243, 25 Am. & Eng. R. Cas., N. S., 243; *Barker v. Ohio River R. Co.* (W. Va.), 4 R. R. R. 132, 27 Am. & Eng. R. Cas., N. S., 132; *Freeman v. Metropolitan St. Ry. Co.* (Mo.), 3 R. R. R. 582, 26 Am. & Eng. R. Cas., N. S., 582; *Citizens' Ry. Co. v. Craig* (Tex.), 3 R. R. R. 516, 26 Am. & Eng. R. Cas., N. S., 516 (street railways); *Davis v. Paducah Ry. & Light Co.* (Ky.), 4 R. R. R. 684, 27 Am. & Eng. R. Cas., N. S., 684.

the party to go into the baggage car, and assisted them in so doing; that he treated them as passengers while in the baggage car, collecting their fares; and it is not contended that he in any wise refused them permission to take passage in the baggage car, or even advised them not to do so. After the party were in the baggage car—the lunatic sitting in the chair, her sister sitting on the arm thereof—appellee and Skeens, for want of a better seat, sat together on a tool box which they found in the car. While thus riding, by a sudden lurch and jerk of the train appellee was thrown from the box down upon the floor and against the side of the car, and Skeens was thrown on top of him, striking him, as he claims, with his elbow or knee, in his side and abdomen, thereby greatly injuring him and causing a rupture or hernia, whereupon, to recover damages, this action was instituted by appellee; setting forth in his petition substantially the facts as herein stated, and claiming that his injuries were caused by the negligence of appellant, its agents and servants, in operating its train. The answer places in issue the material allegations of the petition, and pleads contributory negligence of appellee. The contributory negligence being denied, the issues were completed. A trial of the case by jury resulted in favor of appellee, who was awarded a verdict in the sum of \$800. Appellant's motion for a new trial having been overruled, it is here on appeal.

The instructions given by the court are as follows:

"No. 1. The court instructs the jury that the defendant did not assume the absolute safety of the plaintiff while a passenger on its train, but it was the duty of the defendant's agents in charge of its train upon which plaintiff was a passenger to exercise the highest degree of care and diligence consistent with the mode of transportation adopted to protect him from injury.

"No. 2. If the jury believe from the evidence that the agents of defendant in charge of the train upon which plaintiff was a passenger so negligently operated said train as that plaintiff was by a sudden or violent jerk, not necessary or usual in the operation of said train, thrown upon the floor, and James Skeens was thrown upon plaintiff, striking him with his elbow or knee in the side or bowels, thereby causing plaintiff to have rupture or hernia, they will find for plaintiff such reasonable sum in damages as they may believe, from the evidence, will compensate him for the physical and mental pain, if any, suffered by him by reason of said injury, and for any permanent diminution of power, if any, to earn money by reason of such injury, not exceeding one thousand nine hundred and ninety-nine dollars.

"No. 3. The court instructs the jury that it was the duty of the plaintiff to exercise reasonable care to protect himself while a passenger on defendant's train, and although the jury may believe from the evidence that the defendant was

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negligent, as in instruction No. 1, yet, if they shall further believe from the evidence that the plaintiff was himself negligent, and that the injury, if any, to him, would not have occurred but for such negligence on his part, the law is for the defendant, and the jury will so find.

"No. 4. The riding upon mixed trains composed of freight and passenger cars is unavoidably accompanied with more discomfort and danger than upon the trains devoted exclusively to passengers, and the passenger who accepts carriage upon such a train must be deemed thereby to have assumed the risk of such additional discomfort and danger due to the nature of the train. Now, if you believe from the evidence that the train upon which the plaintiff, Jordan, was riding was such a train, and while he was a passenger thereon the car in which he was riding was forced against the one in front so as to cause the injury complained of, yet, if the train and cars were properly equipped and were carefully handled, and there was no more jarring or jolting than is usually unavoidable in the handling of such trains, then the jury will find for the defendant.

"No. 5. The court instructs the jury that if they believe from the evidence that the plaintiff or Skeens insisted upon taking the invalid and chair into the baggage car, and attended upon the patient there, and at the time there were other seats and accommodation upon the train for safely carrying the patient and her attendants, and that plaintiff would not have been injured, except for his so riding in the baggage car, they will find for the defendant."

There is no rule of the appellant company, either pleaded or shown in the evidence, forbidding passengers riding in the baggage car. If there had been, it might be contended with great force, and upon high authority, that appellee was guilty of negligence by the mere fact that he took passage in the baggage car. The baggage car of a train is essentially a place of greater danger than the passenger coaches. It is nearer the engine, and, in event of a collision or other accident, it is more apt to be derailed or mashed than are the passenger coaches. There is also greater danger from the fact that there are no fixed seats upon which passengers can sit, and this of itself, in case of accident, or jar of the train, is more likely to cause injury than if the passenger was seated in the passenger coach especially prepared for him. But where passengers situated as were appellee's party were under the necessity of going into the baggage car, with the permission, at least, of the conductor, we cannot say that their act in so doing was, of itself, negligence, or relieved the appellant of any responsibility to care for their safety. A mixed train is undoubtedly more dangerous than the regular passenger train, and when one takes passage upon such a train he assumes the additional risk. Wood, in his work on Rail-

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roads (Minor's Ed., vol. 2, p. 1287), says: "A person who rides upon a freight train, or a gravel train, even, and pays his fare to the person in charge of the train, although the orders of the company to the persons in charge of the train are to take no passengers, is nevertheless entitled to recover for an injury received through negligence of the company, to which he has not contributed. Where a company is accustomed to carrying passengers on freight trains, it is bound to exercise the greatest possible care and diligence of which the management of such trains is admissible. It seems that, in regard to the coach in which the passengers are to ride, the duty is the same, whether it is a part of a passenger or a freight train. The same is, of course, true as regards the condition of its roadbed and bridges. But as to other appliances the duty of the company is modified by the necessary difference between passenger and freight trains, and it is bound to use only such care in this regard as the nature of the train will permit. * * * A passenger, in riding on a mixed train, must assume all the risks which are necessarily incident to such travel, and cannot insist on the same care and attention which he might demand on the regular train. If a railway company, said Appleton, J., 'admits passengers into a caboose car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coach at the time of the occurrence of the injury.' * * * Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and, if it is managed with the care requisite, it is all those who embark in it have a right to demand." Elliott, in his work on Railroads (vol. 4, § 1629), thus states the rule: "In a general sense, it may be said that, where a railroad carries passengers on freight or mixed trains, it must exercise the same high degree of care for the safety of its passengers as in other cases. But we do not mean that its duty, and the precaution it must take, are usually the same with respect to the operation of such trains as with respect to regular passenger trains. As to its roadbed, bridges, and the like, it would seem that the duty is absolutely the same, but it is obvious that the risk is greater in riding upon freight trains; that the same appliances cannot be used, and the same speed and comparative freedom from sudden jerks and the like cannot be attained. The duty of the company is therefore modified by the necessary difference between freight and passenger trains, and the manner in which they must be operated; and, while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care

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that is usually and practicably exercised, and consistent with the operation of trains of that nature. Thus it is not bound to equip every car with an air brake, nor to run a bell rope through the cars to the engine. Nor is the company necessarily negligent because in starting, or in taking up and letting out slacks, there is more or less of a jerk or sudden motion of the cars. Nor is it obligated to have a brakeman on every car. So a passenger riding on a freight or mixed train must be deemed to assume all the inconvenience and risk usually and reasonably incident to transportation or travel upon such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train."

Appellee's evidence conduces to show that his party went into the baggage car upon the order or direction of the conductor. All of the evidence establishes the fact that they were there, at least, by his permission and consent, and that after they were seated, and the train started, he was thrown down and injured by a jerk or jar of the train of more than usual suddenness and violence. The question as to whether or not the jar or jerk by which appellee was thrown down was unusual or unnecessary in the operation of such a train as that upon which he took passage was one peculiarly within the province of the jury, and we cannot say that their finding on this subject was flagrantly contrary to the evidence. The instructions of the court fairly presented to the jury the principles of law applicable to the issues involved in this case. Indeed, it is said of No. 5, by appellant's counsel, that it amounted to a peremptory instruction to find for the defendant. This being true, it is difficult to see of what appellant has to complain on this subject. As we believe the court correctly expounded the whole law applicable to the case, in the instructions given, it is not necessary to note or discuss those which were offered by appellant and refused by the court. The verdict was not excessive, and, as said before, not flagrantly against the evidence.

Wherefore the judgment is affirmed.

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(Supreme Court of Georgia, Aug. 11, 1903.)

[45 S. E. Rep. 395.]

Stealing Rides—Penal Statutes—Constitutional Law.

As a measure conducive to the public safety, it is within the power of the General Assembly to pass an act making penal the "stealing or attempting to steal a ride on railroad trains," and this is so whether or not the ride so "stolen" is the subject-matter of larceny.

Same—Same—Same—Sufficiency of Evidence.

The act in question is not, for any of the reasons urged, unconsti-

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tutional. The special plea offered by the accused was properly stricken by the court. The accused having admitted that, on the day named in the accusation, "he had concealed himself upon the train by hiding thereon from the conductor of the train, for the purpose of avoiding the payment of fare, and of stealing a ride upon said train," his conviction was not only warranted, but was demanded, and the refusal of a new trial was not erroneous.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

C. C. Pressley was convicted of stealing a ride on a train, and brings error. Affirmed.

Henry Walker, for plaintiff in error.

Moses Wright, Sol. Gen., and Geo. A. H. Harris, for the State.

CANDLER, J. Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

PERRINE v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey, April 9, 1903.)

[54 Atl. Rep. 799.]

Carriers—Street Railways—Ejection of Passenger—Transfers—Time Limit—Errors of Issuing—Conductor—Actions Ex Delicto.

Where a passenger on a street car was entitled to continue his journey for the same fare on a connecting line within 10 minutes after leaving the original car at the junction, and he was ejected from the connecting car, which he had boarded within the time, by reason of the failure of the conductor of the first car to correctly punch the time of plaintiff's leaving the car on his transfer, such passenger was not limited to an action for breach of contract, but was entitled to recover for his expulsion in an action of tort, unless by his own fault or negligence he aided in producing the situation which led to the expulsion.

Error to Circuit Court, Essex County.

Action by James H. Perrine against the North Jersey Street Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Argued November term, 1901, before GARRISON, GUM-MERE, and COLLINS, JJ.

Van Buskirk & Parker, for plaintiff in error.

Charles L. Borgmeyer, for defendant in error.

PER CURIAM. This was an action of tort for the wrongful ejection of the plaintiff from a trolley car of the defendant company. It appears from the evidence that the plaintiff took passage on one of the cars of the company, which ran over what is known as its "South Orange Line," for the purpose of going to Bayonne. To reach his destination, it was necessary for him to transfer to another car of the defendant company, which ran over its New York line. By paying his

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fare on the first car, he was entitled to ride not only on that car, but also on the New York car, provided he transferred to the latter within 10 minutes after disembarking from that which he first took; and he was entitled to receive a transfer ticket as an evidence of his right to do so. When he paid his fare he demanded of, and received from, the conductor of the South Orange car a transfer ticket to the New York line. He left the South Orange car at the junction point of the two lines, and boarded the next New York car which came along. He tendered the transfer ticket to the conductor of the latter car, but it was refused upon the ground that the time within which it was required to be used (that is, 10 minutes after leaving the South Orange car) had expired. Declining to pay an additional fare, he was then expelled from the car.

The rules of the company required that a conductor issuing a transfer ticket should punch upon it the time at which the passenger left the car, and that no other conductor should receive it in lieu of fare unless it was tendered within 10 minutes after the time punched upon it. The uncontradicted testimony of the plaintiff is that he boarded the New York car not more than 2 or 3 minutes after leaving the South Orange car. The uncontradicted testimony of the conductor by whom the transfer ticket was refused was that much more than 10 minutes had elapsed between the time punched on the ticket and the time when it was offered to and refused by him. It would seem to follow from this testimony that the conductor of the South Orange car had, by mistake, wrongfully punched the time on the ticket; thereby making it valueless as in evidence of the plaintiff's right to transportation on the New York car. It appears from the testimony that the plaintiff did not know of the existence of the rule which required the transfer ticket to be used within 10 minutes after the time punched upon it. Whether or not notice of this rule was printed upon the ticket, does not appear.

On these facts the trial court charged the jury that "if the difficulty was due wholly to the mistake of the conductor of the South Orange car, and if the ten minutes regulation was a reasonable one, then the verdict ought to be for the defendant, for in that case the plaintiff will have to sue the company under another form of action, in an action upon the contract, and not in this action, an action in tort." This instruction was erroneous. If the plaintiff was, by his contract with the company, entitled to ride upon the New York car without the payment of an additional fare provided he boarded that car within 10 minutes after leaving the South Orange car, and was entitled to a proper transfer ticket as an evidence of his right to do so, then an action of tort will lie for his wrongful expulsion, unless by his own fault or carelessness he aided in producing the situation which lead to that expulsion. *Consolidated Traction Co. v. Taborn*, 58 N. J. Law, 1, 32 Atl.

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685. If inquiry on his part would have informed him of the rule which made it necessary that the transfer ticket should be used within 10 minutes of the time punched upon it, and if due care on his part required that he should make such inquiry, then his failure to do so would have been a contributing cause to the injury which he complains of, and would be a bar to his right to recover.

The judgment under review should be reversed.

SHEALEY v. SOUTH CAROLINA & G. RY. CO.

(*Supreme Court of South Carolina, July 8, 1903.*)

[45 S. E. Rep. 119.]

Tickets and Fares—Destination—Customs—Evidence.

In an action by a passenger for personal injuries, a witness can testify as to a custom of the railroad company, within his knowledge, of destroying all ticket stubs after 60 days.

Carriers of Passengers—Care Required in Discharging Passengers.*

While a railroad company must stop its trains at regular stations long enough for passengers to alight and enter its trains, it is not required after such time to ascertain that passengers desiring to get off at such stations have all in fact done so.

Same—Personal Injuries—Negligence—Instructions.

In an action for personal injuries, an instruction that if defendant was negligent, and plaintiff was also negligent, and these two acts of negligence, moving together, brought about the disaster, plaintiff could not recover, was not an erroneous charge on contributory negligence.

Appeal from Common Pleas Circuit Court of Aiken County; Gage, Judge.

Action by Bennett Shealey against the South Carolina & Georgia Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

Croft & Lamb, for appellant.

Jos. W. Barnwell, B. L. Abney, and Hendersons, for appellee.

JONES, J. In this action plaintiff sought to recover damages for personal injuries alleged to have been sustained by him while a passenger on defendant's train at Langley, S. C., August 3, 1900, through the negligence of defendant, alleged to consist in (1) failing to stop the train at Langley Station for a time sufficient to allow plaintiff to alight therefrom; (2) suddenly causing the train to move forward with a jerk while he was on the steps of the passenger coach for the purpose of alighting, thereby bruising, twisting, and straining his right ankle. The jury rendered a verdict in

*Care required in letting off passengers, see monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902; *Atlanta Ry. Co. v. Randall* (Ga.), 6 R. R. R., 698, 29 Am. & Eng. R. Cas., N. S., 698; *Southern Ry. Co. v. Reeves* (Ga.), 6 R. R. R. 870, 29 Am. & Eng. R. Cas., N. S., 870.

favor of the defendant, and from the judgment thereon plaintiff has appealed.

The first exception alleges error in allowing the witness H. W. Colson to testify that it was the custom or practice of the defendant company to destroy all ticket stubs after 60 days. One of the issues being as to the length of time the train stopped at Langley, the defendant, besides offering direct testimony on that point by the conductor and others, sought to show stoppage for a reasonable time by offering testimony as to the number of cash fares and tickets taken up by the conductor to and from Langley on that train, and that time was sufficient to allow such other passengers opportunity to get off and on. No one had called for the production of the original tickets or the stubbook, but nevertheless defendant sought to explain their absence by showing the practice of the defendant company to destroy them after a certain time. On this point the only ruling made by the court was that, "if the witness knows what the practice is, he can testify to it"; and in response to the question the witness answered that the practice is to destroy the tickets and stubbooks after 60 days. Under the court's ruling, the testimony of the witness as to such practice was limited to the witness' knowledge, and error cannot be imputed to such ruling because it afterwards developed on cross-examination that the witness' knowledge was derived from what the custodian of the tickets told him as to the practice. No motion to strike out the testimony as hearsay was made. This exception is overruled.

The second and third exceptions impute error in not charging plaintiff's third and fourth requests to charge, which are as follows:

"(3) The jury is further charged that the mere fact that the conductor of a train stopped the cars a reasonable length of time for passengers to alight therefrom will not be always sufficient to exonerate the company from damages for an injury sustained by a passenger while alighting by reason of the train starting off. The railroad company must go further, and satisfy the jury that they used reasonable care, before starting its train, to ascertain that no passenger was in the act of alighting, or in a position that would be perilous if the train started.

"(4) It is the duty of a railroad company to stop its trains at stations a reasonable time, sufficient for its passengers exercising reasonable diligence to alight from its cars in safety; and it is likewise their duty, before starting its train of cars again, to exercise reasonable care to ascertain that no passenger is in the act of alighting, or in a position that is perilous if the train should start. And you are further charged that if a conductor in charge of a train starts it off after waiting a reasonable length of time, whereby a passenger is injured while in the act of alighting, the company will still be liable in damages, if the conductor, by exercise of reason-

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able care, could have known that a passenger was in the act of alighting, but failed to do so."

The defendant also presented a request to charge in that connection in these words:

"(1) That the duty which the conductor of a railway train owes to a passenger who desires to get off at a given station upon his arrival there is to announce the station, and stop his train for a sufficient length of time to allow passengers on the train to disembark, and those who desire to get on the train to do so, and the question of what is a sufficient length of time is one for the jury to pass on. The conductor is not bound to see that the passengers desiring to disembark at the particular station at which the train has stopped have in fact gotten off; but, after waiting a sufficient length of time to afford them an opportunity to get off, he may presume that they have done so, and then, unless he sees some one in the act of getting on or off or in some perilous position, he may signal his train, and go ahead on his journey."

The court charged the following in substitution of plaintiff's third and fourth request and defendant's first request:

"A railroad company engaged in carrying passengers for hire is held to the exercise of the highest degree of care in that business. The carriage extends from the incipient reception of the passenger on the cars to his disembarkation therefrom on the place provided for his reception. The jury must fix the standard of the highest degree of care, and inquire if the railroad company came up to it or fell short of it. The statute law requires the company shall cause its trains to entirely stop at a station 'for a time sufficient to let off passengers.' Section 2134. What is a sufficient time? is a question for the jury under all the circumstances of each case. When the train stops, what must the conductor do, if anything, to secure the disembarkation of passengers? He must stop a time sufficient to let them off. The statute law so declares. But it would be an assumption of your powers by me to charge you he should or not look to see if the passengers have disembarked, or to charge you he should do any other specific act. The jury must take into consideration the speed of trains, the distance traversed, the number of the stops, the crowds carried, the habits of men, and inquire if, under all the circumstances there present, the conductor exercised the highest degree of care in the particular case. If he did, the company is absolved from liability. If he did not, the company is liable if such shortcoming was one of the proximate causes of an injury to a passenger."

By this charge the jury were substantially instructed (1) that it is the duty of a railroad company to stop the train for a sufficient time to allow passengers to disembark; (2) that the jury must determine whether the time allowed was sufficient from all the circumstances; (3) that the law requires of a railroad company the highest degree of care, in

view of all the circumstances, to avoid danger to a disembarking passenger, and that if defendant failed to exercise such care, and such failure was the proximate cause of plaintiff's injury, the defendant was liable. This charge, we think, correctly stated the principles of law applicable, leaving it to the jury to determine from all the circumstances whether the defendant was negligent, without suggestion from the court as to what fact would constitute negligence. After the railroad carrier has discharged the duty of stopping the train for a reasonable time to allow the passengers to alight therefrom, the conductor may fairly assume that passengers have with reasonable diligence availed themselves of the opportunity afforded to alight, and may signal the train forward, unless he has knowledge that a dilatory passenger, or one impeded in movement by physical infirmity or otherwise, is about to alight, or in some position which would be perilous in the event of starting the train. The law, however, does not impose upon the railroad carrier, after reasonable opportunity for passengers to alight has been afforded, the further duty to ascertain, to know, whether a passenger is in the act of alighting, or on the platform of the coach for that purpose.

The testimony in this case tended to show that the train consisted of two passenger coaches; that when the train stopped at the station the conductor stood on the platform between the coaches, and the assisting brakeman got on the ground; that several passengers got on and off; that from his position the conductor, after looking through the coach and leaning out from the platform, did not see plaintiff, nor did the brakeman see him from his position on the ground near the coach steps; that the brakeman reported to conductor "All right," and the conductor called "Board," and signaled the train forward. The plaintiff testified that he had been seated near the rear end of the last coach; that immediately after the train stopped he started to alight from the rear platform; that while on the platform, on the first step going down, the train started forward with a jerk, which strained and injured his ankle; that at his request a person standing on the platform pulled the stop cord; and that when the train stopped again he alighted. Thus, doubtless, the plaintiff, at the time the train started forward, was concealed from view of both the conductor and assistant. Under these circumstances, to have charged plaintiff's request would have been tantamount to instructing the jury that after stopping a reasonable time it was further the duty of the carrier's agent, before moving the train, to be careful to ascertain whether a passenger was in the act of alighting or in a perilous position, by inspecting the platforms of the coaches, or doing some other act reasonably necessary to ascertain or know whether a passenger is about to disembark. We do not think the law imposes such a duty. If the peculiar circumstances were such as to call for such extraordinary precautions, the charge fully met the issue by

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imposing upon the defendant the duty of exercising the highest degree of care under the circumstances. The foregoing views are supported by the following authorities: 5 Ency. of Law (2d Ed.) 578; *Raben v. Central Iowa Ry. Co.*, 73 Iowa, 579, 35 N. W. 645, 5 Am. St. Rep. 708; *Hurt v. St. Louis, etc., Ry. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374. The case of *Highland Avenue & Belt R. Co. v. Burt*, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95, cited by appellant, relates directly to the rule of care to be exercised by the conductor on a train drawn by a dummy engine, with no regular stopping place; but the same case thus states the rule in Alabama, as applied to ordinary railroads: "When a train of ordinary railroad is brought to a standstill at the proper and usual place for receiving passengers and for permitting passengers to alight, and remains stationary for a reasonably sufficient length of time for this purpose, the duty of the trainmen in this regard has been performed; but while the performance of this duty may relieve the trainmen from any further duty of seeing and knowing that the passengers are on or off, as the case may be, even this would not excuse from culpability, if those in charge of the train in fact saw or knew that its movement would probably imperil a passenger in the act of getting off or on the train, and, in disregard of the peril, caused the train to move, and thereby inflict injury."

Appellant further excepts as follows: "Fourth. Because his honor erred in charging 'that, no matter if the railroad company was negligent, if Shealey was negligent, too, and those two acts of negligence, moving together, brought about the disaster,' the plaintiff could not recover. For his honor erred in stating the law of contributory negligence, for he should have charged that, in order for the railroad company to be exonerated from liability, the negligence of the plaintiff must combine and concur with the negligence of the defendant, and contribute to the injury as a proximate cause, without which the injury would not have occurred.'" In this connection the court charged the jury: "Now, the carelessness alleged there against Mr. Shealey is what is called the 'lack of care'; and I charge you, if in the respects charged he was guilty, if he did those things, and if, in your judgment, that was a lack of ordinary care, then, no matter if the railroad company was negligent, if Shealey was negligent, too, and those two acts of negligence, moving together, brought about the disaster, then the law leaves them where it found them. In other words, a disaster may be the result of one or many causes; in this case, I charge you that if it was the result of two causes, one being the negligence of the railroad, and the other being the negligence of Mr. Shealey himself, and those two, operating together, brought about the disaster, then the law leaves them where it found them." We think the court substantially charged in accordance with the law as contended for by appellant. In order to constitute contributory negligence, the in-

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jured person's negligence must directly and proximately cause the injury, combining and concurring with the negligence of the injured party. *Bodie v. Ry. Co.*, 61 S. C. 486, 39 S. E. 715. A proximate cause is one which operates immediately, not remotely, and is active and efficient in producing the injury. If plaintiff was negligent, and that negligence, moving and operating, brought about the disaster, the natural inference would be that such negligence was an active, efficient, and immediate cause of the disaster; and if such negligence moved together, operated together, with defendant's negligence, the necessary inference would be that plaintiff's negligence combined and concurred with defendant's negligence in causing the disaster. Furthermore, by reference to other portions of the charge, it will be seen that the jury were instructed that defendant was liable if its negligence was a proximate cause of the injury, and the court further charged as follows: "(6) That the jury must not undertake to apportion which was the more negligent, the plaintiff, Shealey, or the defendant company; but they must find for the defendant company if they find either that the company was not negligent at all, or if they find that both the company and the plaintiff, Shealey, were negligent, provided they find that such negligence of the plaintiff, Shealey, was one of the proximate or immediate causes of the accident."

Appellant's last assignment of error is as follows: "Fifth. Because his honor erred in charging the defendant's fourth request (4a), which is as follows: 'Even if the jury finds that the plaintiff was injured by attempting to get off of the train in question, yet, if they further find that he was not injured by the negligence of the defendant company or its agents, he cannot recover, because there can be no recovery against the defendant unless there is proven to have been negligence on the part of the defendant, and that said negligence injured the plaintiff.' For it is respectfully submitted that it is not a correct or full statement of the law and is misleading. His honor should have further charged, in connection therewith, that, in order to exempt the railroad company from liability, the jury should find that the negligence of the defendant did not operate as a proximate or one of the proximate causes of the injury." We see no error in the charge.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

SOUTHERN RY. CO. v. HOBBS.

(*Supreme Court of Georgia, June 3, 1903.*)

[45 S. E. Rep. 23.]

Infirm Passenger Carried beyond Destination—Duties of Conductor—Evidence—Customs.*

Relatively to a female passenger on a railway train, who is partially

*As to the care required in letting off passengers, see preceding case and foot-note.

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blind, and who informs the conductor of her infirmity, and requests him to assist her in alighting from the train when it reaches her destination, which he promises to do, it is at least the duty of the carrier to stop the train at its station a sufficient length of time to enable her, without undue haste, to leave the train in safety; and if the conductor, despite his promise, signals the train ahead before the passenger has had a reasonable opportunity to reach the platform of the car, and she is in consequence carried beyond the station, and then put off at a point some distance therefrom, the carrier is liable to respond for all damages directly attributable to the tortious conduct of its conductor.

(a) Such a promise, fairly construed, does not amount to an undertaking on the part of the conductor to enter the car in which the passenger is riding, assume charge of her bundles, and escort her from her seat down the aisle and out upon the platform, unless the passenger is so helpless as to require this extraordinary attention, and the conductor has notice that such is the case.

(b) In the absence of appropriate pleadings, the passenger cannot, on the trial of an action against the carrier for being carried beyond her destination, rely on and make proof of a custom on the part of its conductors to lend especial assistance to lady passengers when traveling unattended. In no event would proof of such a custom be relevant, unless it were shown that the governing officials of the carrier had knowledge of the custom, and recognized it as one of the observance of which ladies traveling without escort had a right to expect and demand as matter of right.

Duty to Announce Approach to Stations.

While it is the duty of a railway company to duly announce to passengers the approach of its trains to regular stations, in order that they may be prepared to promptly alight at their respective points of destination, yet a failure to comply with this duty cannot count against the company, relatively to a passenger who is in no way misled thereby.

Aggravating Circumstances—Evidence—Instructions.

In view of the facts brought to light on the trial of the present case, it was erroneous to charge the jury upon the theory that the evidence warranted a finding that there were aggravating circumstances attending the tort alleged to have been committed upon the plaintiff by the defendant company.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; C. G. Janes, Judge.

Action by Susie Hobbs against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hugh M. Dorsey, for plaintiff in error.

Jas. Beall and Edwards & Ault, for defendant in error.

SIMMONS, C. J. An action for damages was brought by Mrs. Susie Hobbs against the Southern Railway Company, the plaintiff relying for a recovery upon the following allegations of fact: On December 22, 1900, about 10 o'clock p. m., she took passage from Birmingham, Ala., to Bremen, Ga., over the company's line of railway. Soon after its train left Birmingham, the conductor in charge thereof came to her and took up her ticket, "and petitioner then and there got said conductor to agree to assist petitioner in alighting from the train at Bremen, and to assist her to the depot"; she informing him that "she was traveling alone, and had more baggage than she could manage, and, besides, she was par-

tially blind, wherefore it would be almost impossible to travel unassisted." The conductor "assured her that he would see her off the train all right." When the train reached Tallapoosa, Ga., she repeated her request for assistance, and he "reassured her that he would take care of her, and requested that petitioner be not alarmed." The conductor "did not enter the car that she was in after the train left Waco, three miles west of Bremen," and neither he nor any "other person called out Bremen Station, as the law requires, nor in no way informed petitioner that the train had arrived at Bremen." He "entirely ignored his promises and his duties to assist * * * petitioner from said train after the same stopped at Bremen, and [she] was forced to attempt to get off said train unassisted; and * * * just as she was attempting to get off of said train, the said conductor waved the engineer ahead, and the train moved off, and carried * * * petitioner about one-fourth of a mile east of the depot before stopping." When the train was again stopped, she "appealed to said conductor to carry her back to the depot, telling him that it was his duty to back said train to the depot and let her get off; * * * that she was afraid to undertake to go alone, and that she could not conveniently carry her baggage; that it was heavy and unhandy; and that she was almost blind, and could not find her way through such black darkness." The conductor, however, "entirely ignored each and all of her appeals, and told petitioner that he could not back his train, and that he must go, and did go and leave [her], at two o'clock Saturday morning, fully one-quarter of a mile east of the depot, in the cold rain, unprotected or unassisted, to grope her way alone in the dark and through the cold rain." Petitioner "suffered untold miseries and pains, through fear and exposure, on account of" being thus put off the train "at a place where she could get no help or assistance, there being no house near her, and she being in a strange place, in a strange country, a female, alone, and almost helpless, all of [which] defendant's agents and servants knew." She was forced to get off the train at "a rough, rocky place," and between that point and the depot the company's track passed over a high embankment. It was necessary that she should "travel on the railroad, to find her way at all, and to keep from falling down said embankment." The company's right of way was very rough, having on it rocks and ballast. "The night was so dark that she was forced to feel her way along, and * * * she was expecting every minute to be attacked by tramps." Moreover, "she contracted a severe attack of la grippe on account of being exposed in the cold and rain, * * * which has caused her great pain and suffering, besides rendering her unable to perform scarcely any work." The defendant company interposed a demurrer to the plaintiff's petition, and also filed an answer in which denial was made of all her allegations of misconduct and negligence on

the part of its servants, and in which the defense was set up that "it stopped its train at the station of Bremen for sufficient length of time for the plaintiff to have gotten off; * * * that it called the station of Bremen in the car, and within the hearing of the plaintiff," and, if she did not get off at that station, "her failure to do so was her own fault and negligence," etc. The trial judge overruled the company's demurrer, and the jury returned against it a verdict for \$600. It is now before this court, complaining of the overruling of its demurrer, and of the refusal of the court below to grant it a new trial.

1. One of the grounds upon which the demurrer was based was that the promise of assistance which the plaintiff alleged had been made to her by the conductor amounted to no more than a voluntary undertaking on his part, and was in no way binding upon the company, since it was under no legal duty to render such assistance as he had been asked to give her. We are not prepared to say that this position was well taken, considering the contention of the defendant as an abstract proposition of law. It is undoubtedly true that a mere gratuitous promise on the part of a railway conductor to do a passenger a service which the carrier is under no legal or contract duty to perform is not binding upon the carrier. *Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284; *Central Railroad v. Whitehead*, 74 Ga. 442, 449. And it follows, of course, that, as a carrier is not ordinarily under any duty to render assistance to passengers in alighting from its cars (*Daniels v. Railroad Co.*, 96 Ga. 786, 22 S. E. 956), it cannot be held accountable for a failure by its conductor to comply with a promise to give such assistance to a passenger not entitled to claim it as a matter of right, or to a passenger who, though he may need assistance in alighting at his destination, fails to so inform the conductor, when he has no notice of that fact. *Western & Atlantic R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015. There is, however, much respectable authority for the proposition that when a "passenger is manifestly aged, infirm, sick, or of defective eyesight, then it becomes the duty of the railway carrier to render to him or to her such assistance," provided, of course, that the "servants of the carrier know, or by reasonable attention to their duties ought to discover, the fact of such infirmity." See 3 *Thomp. Negl.* § 2846, and cases cited; also *Hutch. Car.* (2d Ed.) §§ 617a, 670; 2 *Shear. & Redf. Neg.* (5th Ed.) § 510; *Ray, Neg. Pas. Car.* § 67; 1 *Fetter, Car. Pas.* § 106 et seq. We are inclined to the view that such is the law. But be this as it may, it is certainly true that the plaintiff's petition was not open to demurrer because she therein alleged the making and nonfulfillment of promises by the conductor to render her assistance in alighting from the train when she reached her destination. The gist of her grievance

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against the company, as set forth in her petition, was that she was not given notice of the approach of the train to the station, or afforded a reasonable time and opportunity to alight, but was carried beyond the station a quarter of a mile, and then forced to leave the train at a lonely place, in the nighttime, with no choice save to travel on foot through the rain back to the station. The account given concerning what occurred between the plaintiff and the conductor prior to the arrival of the train at Bremen merely served to emphasize her recital of the carrier's neglect of duty. "It is a well-settled principle of law that a railroad company carrying passengers, in order to afford them opportunity to leave the train at their places of destination, is bound to have the names of the different stations announced upon the arrival of the train, and then to stop the train for a sufficient length of time for passengers to get off with safety." 5 Am. & Eng. Enc. Law (2d Ed.) 565. To the same effect, see, also, Ray, Neg. Pas. Car. 138; Hutch. Car. (2d Ed.) § 614.

That Mrs. Hobbs informed the conductor of her intention to leave the train at Bremen, and that he assured her "he would take care of her and requested that petitioner be not alarmed," were relevant and material circumstances to be alleged, as showing she had exercised all the diligence to be reasonably expected of her in the matter, and that the conductor had full and ample notice of her desire to leave the train at a designated station. That she further informed the conductor she was partially blind and was traveling unattended was likewise relevant since, "if any passenger needs an unusual time to get off, by reason of physical infirmity, he must notify the conductor of the fact." 2 Shear. & Redf. Neg. (5th Ed.) § 508, p. 924. That the conductor promised Mrs. Hobbs to "see her off the train all right" was another fact germane to her case as laid; and it was proper to allege this promise, if given as indicating that the conductor understood what she told him concerning her infirmity, and recognized that, as to one thus afflicted, he was bound to observe the reasonable requirement of the law that when a particular passenger, because of sickness or physical infirmity, is "unable to leave the car with the usual celerity," and so notifies the conductor, "then he should furnish due opportunity" to alight in safety. Bish. Noncont. Law, § 1100. See, also, 5 Am. & Eng. Enc. Law (2d Ed.) 577, 578. To carry the plaintiff beyond her destination was, in view of the allegations set forth in her petition, inexcusable negligence. To stop the train at a lonely place far beyond the station, and there call upon her to alight, amounted to a technical expulsion, even though she may have made no protest; and, on the assumption that all she alleged was true, she was entitled to compensation for the annoyance and inconvenience of being carried past her station, and of being compelled to return thereto on foot, as well as for pain and suffering from illness

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thus brought about, loss sustained by reason of inability to work, etc. *Southern R. Co. v. Humphries*, 108 Ga. 594, 34 S. E. 283. What has been said above disposes of all questions raised by the defendant company's demurrer.

In its motion for a new trial, exception was taken to certain instructions which the court gave the jury touching the failure of the company's conductor to comply with the promise of assistance which she claimed he had made to her. These instructions were not nicely adjusted to the pleadings or the evidence, for they were based on the theory that the company's liability depended exclusively upon whether or not such a promise was given and ignored by the conductor. Counsel for the railway company requested the court to charge the jury as follows: "If you believe that the promise of the conductor was, as alleged, to help the plaintiff alight, and that the conductor was at the proper and usual place to help the plaintiff alight when the train arrived at Bremen, then his failure to go into the car and get plaintiff would not make the defendant company liable." We think this request should not have been, as it was, refused. Mrs. Hobbs testified, as a witness in her own behalf, that when the train stopped at the Bremen station she kept her seat and waited "just a moment" for the conductor to come and assist her, and that she then "got up and started to the door to see if [she] could see any light at the depot," but before she "got to the door the train started"; that the train stopped "just a few moments"—not longer than "two or three minutes"; that she "started before the train started"; that the conductor "had had time to help the other passengers off and get back where" she was, she supposed, before the train started, and would have come to help her off if "he had done like all the rest had" (referring to other conductors who had assisted her on a journey she had taken from Texas to the city of Birmingham, where she boarded the defendant's train); that she "didn't make any effort to get off the car when they stopped at Bremen," but waited for the conductor to come to her in the car; and that "the train started before he came in." Evidently the plaintiff, in thus making no effort to leave the train, acted under the impression that the conductor would, after helping all other passengers to alight from the steps of the car to the station platform, come to where she was sitting in the car, burden himself with her bundles, escort her down the aisle and out upon the platform of the car, and then assist her down the steps and onto the station platform. There was introduced in evidence no special contract between her and the company, whereby it undertook to bestow upon her any such extraordinary attention. On the contrary, we gather from the record before us that she was the holder of a ticket such as is customarily sold to a mere ordinary member of the traveling public. The question, therefore, is, did the company, by selling her such a ticket, enter into a contract-

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ual obligation to render to her the special services she expected of the conductor?

A contract of carriage on the part of a carrier of passengers differs essentially, as a general rule, from that of a carrier of goods, since the latter assumes the duty not only of transporting to destination, but of unloading its cars as well. So it is universally held that, as to passengers able to help themselves in entering and leaving a train, a railway company is under no duty either to load or unload them, provided it furnished suitable means for safely boarding and alighting from its cars. There was in the present case no pretense on the part of the plaintiff that she was unable to leave her seat in the car, and walk without assistance down the aisle and out upon the platform, carrying her bundles with her, and there presenting herself and them to the conductor. She was but 18 years of age at the time, and her only physical infirmity, so far as was shown at the trial, was partial blindness; she being near-sighted, and her eyes being weak. Certainly the defendant company was under no duty to furnish her assistance which she did not need because of her infirmity, and the conductor was without power to bind the company by any promise he may have made to render assistance which she did not require. Moreover, the only promise she claims he made to her was to assist her "off the train," which he stated "it was his duty to do." As was held in the case of *W. & A. R. Co. v. Earwood*, 104 Ga. 130, 29 S. E. 913, wherein it appeared that a conductor made a like promise to give assistance to a female passenger, such an undertaking does not amount to "a promise by the conductor to leave his other business and go into the car to assist [a] passenger from her seat to the platform and down the steps," but merely to a promise to assist the passenger, after she has reached the platform of the car, in alighting therefrom to the ground. In pronouncing the judgment of the court in that case, the writer took occasion to remark: The lady "construed the promise of the conductor to mean that when the train arrived at her destination he would leave his other business, come into the car, and assist her from her seat to the platform and down the steps. The promise made, even if it had been binding, did not go to this extent. It would greatly delay the business of the company if it could be held, on such a promise, that it was the duty of the conductor to go to the seats of all the ladies who had made similar requests, and assist them, one by one, to the platform of the car, and down safely to the ground." The evidence in the present case shows almost conclusively, we think, that Mrs. Hobbs was afforded ample time to have left her seat and gotten to the platform of the car before the train started, and that the real cause of her being carried beyond the station was her reliance upon the wholly unwarranted assumption that the conductor had promised to pay her the especial and gratifying

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attention she had received from other conductors while en route from Texas to Birmingham.

It appears that the trial judge permitted the plaintiff to prove that it was "a custom on the road for conductors to lend especial assistance to" female passengers when traveling unattended. Counsel for the company made timely objection to the admission of evidence along this line, because there "was no allegation in the petition that would authorize any such evidence to go to the jury," and on the further ground that it was irrelevant and immaterial. Obviously the evidence should, for the reasons given, have been excluded. That its admission was harmful to the defendant is equally clear, since the conductor, who testified by way of interrogatories, flatly contradicted the statement of the plaintiff that he had been informed of her infirmity, and had promised to assist her in alighting from the train. In view of the proof offered concerning the custom referred to, the jury may have reached the conclusion that, irrespective of the question whether or not the conductor made such a promise, he was bound to observe this custom, and give to the plaintiff the special consideration usually bestowed upon all ladies traveling without escort. Furthermore, even if such a custom really existed, it should, in the absence of proof that the company's governing officials had knowledge thereof, and recognized it as entering into the contracts of carriage made with purchasers of tickets, be treated as amounting to no more than a practice on the part of obliging and chivalrous conductors to render to ladies courteous attention, which they were not, in their capacity as ordinary members of the traveling public, entitled to demand as matter of right, and which the conductors were under no duty, relatively to either the carrier or to female passengers, to bestow.

2. It is, as we have above stated, the duty of a carrier of passengers to make to them timely announcement of the approach of its trains to regular stopping places. There was in the present case a conflict of evidence as to whether such an announcement was made in the car in which the plaintiff was riding immediately before the train arrived at Bremen; and the court charged the jury, in effect, that if the conductor failed to notify her in some way that she had arrived at her station, and because of his omission to do so she was carried beyond her destination, and she "suffered injury thereby, she could recover." This charge should not have been given for the plaintiff, during the course of her testimony as a witness, and while undergoing a searching cross-examination, unequivocally, though with unbecoming reluctance admitted she knew when the train next stopped after leaving Waco that she had reached her destination. Accordingly the alleged omission on the part of the company to announce in her hearing the approach of the train to the Bremen station could

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in no way have misled her. As already observed, the true cause of her being carried beyond that station seems to have been her failure to make any effort to leave the train. Had she duly made her way to the platform of the car, all would doubtless have been well, as the record before us discloses that the conductor assisted other passengers to alight from the steps to the station platform, and was in a position to likewise assist her. Upon the assumption that he did make to her the promise of assistance alleged, but overlooked the same when her destination was reached, still, if she had presented herself to him on the platform of the car, instead of relying upon the mistaken belief that he would come into the car after her and her bundles, his promise might have been recalled to him, or he might, as a matter of course, have helped her, as he had the other passengers, to alight.

3. Exception was also taken to the following charge of the court: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages." It is a matter of grave doubt whether the plaintiff was entitled to recover anything at all, but, be this as it may, no charge on the subject of aggravating circumstances should have been given. There was no pretense on her part that the conductor treated her harshly or discourteously, or with anything save polite consideration, when he discovered that she had been carried past the station, and sought to make amends by promptly stopping the train and affording her an opportunity to get off. As to this phase of the case, it is controlled by the decision of this court in *Southern R. Co. v. Humphries*, 108 Ga. 594, 34 S. E. 283 (a similar case upon its facts), wherein it was held that mere negligent omission of duty on the part of a railway conductor does not call for punitive damages.

Judgment reversed.

LUMPKIN, P. J., absent. CANDLER, J., disqualified.

WESTERN MARYLAND R. CO. v. SCHAUN.

(*Court of Appeals of Maryland, July 1, 1903.*)

[55 Atl. Rep. 701.]

Ejection of Passenger—Tickets—Description of Holder—Negligence of Conductor—Actions—Nature and Form.

Where a passenger was ejected from a railroad train by reason of a defect in her return ticket, in failing to properly describe her personal characteristics, which resulted from the conductor's negligence in punching said return ticket on the going trip, such passenger was only entitled to recover damages in an action for breach of contract, and could not recover in an action *ex delicto*.

Western Maryland R. Co. *v.* Schaun**Same—Evidence.**

Evidence that the conductor who ejected plaintiff was the same conductor who punched plaintiff's ticket on the going trip, and that he was acquainted with her, was insufficient to establish that such conductor had knowledge that plaintiff was the same person who presented the going part of the ticket, where he and the brakeman on the going train both testified that they did not see plaintiff on such train, but that they remembered seeing plaintiff's daughter thereon.

Appeal from Court of Common Pleas; Albert Ritchie, Judge.

Action by Maria A. Schaun against the Western Maryland Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

R. E. Lee Marshall and J. Hanson Thomas, for appellant.
William Colton, for appellee.

FOWLER, J. This is an action to recover damages by reason of the plaintiff's alleged unlawful ejection from one of the cars of the defendant railroad company. The plaintiff, Mrs. Schaun, resides in Baltimore City, but spends the summer at Pen Mar, on Western Maryland Railroad, and it appears from the testimony that she frequently uses the defendant's road in traveling between these points. On the 18th July, 1901, she purchased at Hillen Station, Baltimore, a Pen Mar excursion ticket. These tickets were issued by the defendant company, at a greatly reduced price, for use on the Pen Mar excursion train, No. 13, and on that train only, on the date stamped on the ticket. There were other conditions; and among them, that the excursion ticket must be presented to conductor on west-bound trip, who was required to issue in exchange a return ticket, Pen Mar to Baltimore, good only on excursion train No. 24, of date stamped on said return ticket, and canceled by conductor on margin thereof. This return ticket was not to be furnished by conductor unless he had personal knowledge that the individual by whom it was to be used was actually on west-bound excursion train on date stamped on said excursion ticket. It was further conditioned that this exchange ticket issued by the conductor in exchange for excursion ticket from Baltimore to Pen Mar would be honored for passage only for the person as described on such exchange ticket. On the exchange ticket itself is printed the following:

"Description of Holder of Balt. Ticket No. 12108, who alone is entitled to use this return ticket from Pen Mar to Walbrook as indicated by punch mark."

Following this are 12 small divisions on the ticket, thus arranged:

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Man	Dark	Short	Elderly
Woman	Light	Stout	Middle age
Child	Tall	Slight	Young

In order to prevent the transfer of these tickets, the railroad company required the conductor to punch a general description of the passenger to whom such exchange ticket was given.

It appears, according to her testimony, that, on the day named, Mrs. Schaun, the plaintiff, after purchasing her excursion ticket at Hillen Station, got on the proper train, gave up her Baltimore Pen Mar excursion ticket, and received an exchange ticket, which she said, believing it was correct, she put in her pocket without any inspection or examination. It is apparent that the slightest inspection of the ticket would have informed the plaintiff that she was not the person described as the holder thereof. Naturally she was much surprised, therefore, when, on returning the same evening on the proper train, the same conductor who gave her the exchange ticket refused to accept it because it did not describe her personal appearance. The ticket called for a woman, light, slight, and young, and the plaintiff was dark, stout, and middle aged. She refused to pay the fare of \$2.20 from Pen Mar to Baltimore, and the conductor put her off at Blue Ridge Summit, without using any undue force or violence. It also appears from the testimony of the witness Hoover that he was the conductor in charge of the excursion train the morning of July 18th; that he had known the plaintiff for three years, and that he did not see her on the train that morning; that her daughter was; and that she was traveling on a Pen Mar excursion ticket. He also testified that, by the rules of the company, he was authorized to call on the brakeman to assist him in collecting and punching the tickets: that he had requested him to punch tickets that morning, owing to the number of people that were on the train, and the fact that he (the conductor) was liable at any moment to be called away to look out for signals or orders; and that he did not examine the ticket after he gave it to the brakeman to see whether it was punched correctly. The witness Gelbach, the brakeman, testified that he assisted the conductor, punched the tickets, and handed them to the passengers; that he knew the plaintiff; that she frequently rode on defendant's trains; he did not see her, but did see one of her daughters, on the train on the morning of the 18th July. The witness Miss Schaun, the daughter of the plaintiff who was referred to by the brakeman, testified she was not on the train at the time mentioned.

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While the foregoing is a brief statement of only a part of the facts, sufficient has been said to present the one question the solution of which, in our opinion, will dispose of this case. That question is presented by the defendant's first prayer, by which the court was asked to instruct the jury that there was no legally sufficient evidence to prove that the plaintiff was unlawfully ejected from the defendant's cars. Starting with the concession that the plaintiff was in fact upon the defendant's cars, for the jury evidently so found from the evidence, under the court's instruction given in lieu of plaintiff's second prayer, and also conceding, it, as the jury found, she was then on the train, that the misdescription placed upon the exchange ticket was through the fault or negligence of the conductor or brakeman, or both, we are to decide whether, in this action, the plaintiff can recover.

Since the decision of *Stocksdale's Case*, 83 Md. 245, 34 Atl. 880, it is settled law in this state, and the proposition is supported by the weight of authority, "that, when a passenger receives a defective ticket from an agent of the company by reason of the mistake or negligence of the agent, the conductor may refuse to accept such ticket, and is authorized to compel the passenger to leave the train if payment of the fare is refused." "In these cases," we said in the case just cited, "the passenger should pay the fare demanded, and seek his remedy by an action for the breach of the contract, and not by an action of tort for the ejection." In the case of *Huford v. Grand Rapids & I. Ry. Co.*, 53 Mich. 118, 18 N. W. 580, the absolute necessity of such a rule is recognized by Judge Cooley; and he says that not only railroad companies, but the public, are especially interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains, "and, if the enforcement causes temporary inconvenience to a passenger who, by accident or mistake, is without proper evidence of his right to a passage, though he has paid for it, it is better that he should submit to temporary inconvenience, than that the business of the road be interrupted, to the general annoyance of all who are upon the train." It is said by the learned counsel for the plaintiff that there has been an astonishing change in the views of the Supreme Courts of Missouri and Kansas upon this question, but there has been no such change in the views of this Court since we expressed our opinion in *Stocksdale's Case*, *supra*; and, so long as the law laid down in that case remains unquestioned, an action of tort for damages will not lie on the case made by this plaintiff, and she must be left, as is said in *Bradshaw v. South Boston Railway Co.*, 135 Mass. 407, 46 Am. Rep. 481, to her remedy, if any she has, in an action against the defendant for a breach of contract.

But it is said the fact that the conductor who gave the plaintiff the defective ticket is the same one who on the re-

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turn trip refused to accept it distinguishes this case from the Stocksdale Case, and other cases of that kind. We cannot, however, understand what effect this fact can have, unless the jury are to infer therefrom that, when the conductor refused to accept the plaintiff's exchange return ticket, he knew she was in fact on the train in the morning, and knew also that he had erroneously punched the ticket. Now, whatever the fact may be, he swears he did not see the plaintiff that morning. The brakeman testifies that he did not see her, and both of them swear they saw her daughter. But let us assume both he and the brakeman are mistaken. They may have forgotten. It is not reasonable to require that he should remember the fact that the plaintiff was on the train, any more than that he should be held to remember many others he was accustomed to see there day after day. The very fact that she and many others were constant travelers on his train would render it difficult for him to say with certainty whether she or they were on the train on any particular day. We do not think, therefore, it can be inferred, merely from the fact that she was on the train, or even that he saw her there, that morning, that he remembered and knew the fact in the evening, when she presented the ticket, which upon its face described a person of entirely different personal appearance from the plaintiff. There is no other proof in the case that at the time he refused to accept the ticket on the evening train he knew she was on the train in the morning, and that she was the person to whom he had given the rejected ticket. If there was any legally sufficient evidence in the case of such knowledge on the conductor's part, then his conduct would have been entirely unjustifiable; but, in the absence of proof, we cannot infer, nor allow the jury to infer such knowledge on the part of its agent as would render the defendant responsible in this form of action.

We are of opinion, therefore, that the judgment appealed from must be reversed, but without prejudice to the right of the plaintiff to enforce her rights, if any she has, in another form of action. Reversed, without prejudice, with costs.

BAILEY v. SEATTLE & R. RY. CO.

(*Supreme Court of Washington, Sept. 14, 1903.*)

[73 Pac. Rep. 679.]

Permitting Witness to Change Testimony.

Where, in an action for injuries to plaintiff's ankle, she testified on cross-examination that she had not had previous trouble with her ankles, and thereafter a witness for plaintiff on cross-examination testified that plaintiff told him that she suffered an injury to her ankle in getting off a railroad car when she was a little girl, it was not error for the court to permit plaintiff to be recalled, and to testify that her right ankle had been injured as stated, but that it was for injury to her left for which she sued.

Bailey v. Seattle & R. Ry. Co**Cross-Examination.**

Where, in an action for injuries, a witness on direct examination merely testified to the condition of a platform at the time of the accident and the actual occurrence there, evidence elicited from him that plaintiff had told him that she had suffered an injury to her ankle when she was a child was not proper cross-examination.

Rebutting Evidence—Impeaching Witness.

In an action for injuries to a passenger by stepping on a rotten plank in a platform, a witness for defendant testified that the platform was made safe the day prior to the accident. Plaintiff, in rebuttal, called a witness who testified that no repairs were made to the platform until several days after the accident, and on cross-examination stated that he did not know that plaintiff had injured her foot prior to the injury complained of, and that he had never stated that she had so injured it. Defendant thereafter called a witness and asked him whether or not plaintiff's witness had not told him that plaintiff had injured her ankle when a girl, and that it was always weak: *held*, that such question was properly excluded as not proper rebuttal or impeachment, since plaintiff could not be prejudiced by a statement made by her witness not in her presence.

Injury to Passenger—Defective Platform—Contributory Negligence—Pleading—Evidence.

In an action for injuries to a passenger by stepping on a defective plank in a platform, in the absence of a plea of contributory negligence, evidence tending to show that plaintiff stepped on the platform on a weak limb, and was careless in so doing, was inadmissible.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Caldonie Bailey against the Seattle & Renton Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Peters & Powell, for appellant.

Will E. Humphrey, for respondent.

DUNBAR, J. Action for personal damages. The plaintiff brought suit against defendant in the superior court of King county, alleging that she was a passenger in one of defendant's cars running from Seattle to the station of Mathieson, and that in getting off said car she stepped into a hole in the platform, which latter was rotten and out of repair, whereby she sprained her ankle, for which she claimed damages in the sum of \$1,000. Defendant answered, denying the acts of negligence complained of, and denying any knowledge or information with respect to the injury or damages. The trial resulted in a judgment in favor of plaintiff for the sum of \$292.50. From said judgment this appeal is taken, and two errors only are assigned: (1) The action of the court in refusing testimony offered by the defendant to impeach plaintiff's witnesses; (2) permitting the recall of the plaintiff to contradict on the witness stand testimony which she had previously given on her direct examination.

The appellant, in its brief, discusses the second error first, and we will follow that order in disposing of the case. The plaintiff, Mrs. Bailey, on cross-examination testified as follows: "Q. Now, Mrs. Bailey, that ankle has always been

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weak, hasn't it? A. No, sir. Q. Didn't you have trouble with it as a girl? A. No, sir; I never had any trouble. Q. With either of your ankles? A. I had no trouble. Q. This trouble is the first you have had? A. That was the first trouble I ever had. If I had ever had any trouble, I could not have worked like I did." Witness Braillard was called for the plaintiff, and testified in her behalf. On cross-examination he testified as follows: "Q. Didn't Mrs. Bailey at that time tell you, Mr. Braillard, that she had had trouble with that ankle before—that it had been weak? A. At that time? Q. Well, at some time. A. Yes; she told me that when she was a little girl, I think—a child—that she had an accident in getting off a car some place in the East. All I can remember of it was that she was visiting with her folks, and they got into a railroad car, and in getting off she sprained her ankle." Mrs. Bailey was then recalled by the plaintiff, and asked to state which ankle it was which she told Braillard she had injured when a girl. This question was objected to, the objection was overruled, and the answer was as follows: "It was my right ankle. Well, when my ankle was hurt when I was a little child. It did not amount to anything. I don't even remember telling Mr. Braillard about it, but I certainly did, or he would not have remembered about it. But it was my left ankle that was hurt on the Renton car." We think it was properly within the discretion of the court to admit this testimony. In the first place, the cross-examination which elicited the statement from the witness Braillard was not properly admitted, his direct examination having reference simply to the condition of the sidewalk at the time of the accident, and the actual occurrence there. In the second place, the object of a lawsuit is to elicit the truth, and a seeming contradiction was explained by the testimony objected to. We think there was no prejudicial error in its admission.

The second point is with reference to the testimony of the witness Lynde. The defendant had testified that the platform in question had been repaired and made sound on the 26th day of November, 1901, and had no hole or rotten plank in it. The plaintiff, in rebuttal, called her brother-in-law, Lynde, who testified that he got off at this place the day after Mrs. Bailey was injured, and no repairs had been made to the platform at that time, and that they were not made until several days after the accident. Lynde also testified on cross-examination that he did not know that Mrs. Bailey had injured her foot prior to the injury complained of, stating that he never had heard of it before, and that he never had stated that she had so injured it. Defendant thereafter called witness Womach, and asked him whether or not the witness Lynde had stated to him that the plaintiff, Mrs. Bailey, had injured her ankle when a girl, and that it was always weak. Plaintiff objected to this on the ground that it was not material to the issue, and was not proper rebuttal or impeach-

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ment, which objection was sustained. We think this objection was properly sustained. Mrs. Bailey could not be prejudiced by a statement made by Lynde not in her presence. Hence the defendant could not have introduced the witness Womach to prove that Lynde had said that Mrs. Bailey had a weak ankle, and, the cross-examining party not being entitled to prove it as a part of his case tending to establish his plea, it was not material and could not be proven here in the manner contended for. In addition to this, there was no plea of contributory negligence on the part of the plaintiff to render material the testimony for the purpose of establishing as a fact—which could be the only material fact elicited—that she was negligent in carelessly alighting upon a platform on an unsound limb. Moreover, as in the other point, the direct examination of Lynde was not directed to the questions asked in cross-examination, and they were, therefore, not proper subjects for cross-examination, and it is not error for a court, when improper statements are drawn out on cross-examination, to refuse to allow the party who draws them out to contradict them.

We think no error was committed, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

KENNEDY v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama, July 10, 1903.)

[35 So. Rep. 108.]

Street Railways—Tickets and Money Fare—Reasonable Regulations—Ejection.*

A regulation of a street railway company requiring a higher rate where cash is paid the conductor than is charged for a ticket is not reasonable, and furnishes no justification for ejection of a passenger tendering only the price of a ticket, where he is taken on at a place where tickets are not for sale, though they are for sale at a station 1,000 feet away.

Appeal from City Court of Bessemer; B. C. Jones, Judge.

Action by W. F. Kennedy against the Birmingham Railway, Light & Power Company. Judgment for defendant. Plaintiff appeals. Reversed.

It was averred in each count of the complaint that the defendant was engaged in operating a street railway system in Birmingham and in Bessemer, and between said named places; that the plaintiff boarded one of the defendant's cars at or near the intersection of Fourth avenue and Eighteenth streets in Birmingham for the purpose of going to Bessemer; that at said place, where plaintiff boarded the car, defendant had no

*As to whether a carrier may charge extra fare where there is a failure to procure a ticket, see foot-note appended to *Phillips v. Southern Ry. Co.* (Ga.), 1 R. R. R. 80, 24 Am. & Eng. R. Cas., N. S., 80.

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depot or agent, or tickets for sale; that, upon the conductor's coming to collect plaintiff's fare, plaintiff tendered him 15 cents, which was the regular fare on said line from Birmingham to Bessemer; that the conductor took the fare, but later told the plaintiff that he could only take him (the plaintiff) to Wilkes, a station on said line between Birmingham and Bessemer, and that the fare from Birmingham to Bessemer, when passengers had no ticket, was 20 cents; that upon the car arriving at Wilkes, and the plaintiff's refusing to pay the additional 5 cents, the conductor wrongfully ejected plaintiff from said car, causing him great vexation, annoyance, and humiliation, and damage to his character. There were demurrers interposed to the complaint, as amended, and these demurrers were overruled. Defendant pleaded the general issue to the following special pleas: "(4) The defendant, for a further answer to the complaint in this cause, and for a further answer to each and every count of said complaint, separately and severally says that at the time of the wrong and grievances therein complained of, and for a long time prior thereto, it had in force and effect a rule or regulation that the ticket rate of fare from Birmingham to Bessemer was fifteen cents (15); that such fare, if paid in cash to its conductor in charge of its trains, was twenty cents (20); and the defendant further avers that plaintiff boarded one of its trains at Birmingham which was bound for Bessemer, and did not have a ticket entitling him to ride to Bessemer. Defendant avers that plaintiff paid to its conductor in charge of said train fifteen cents (15) in cash, stating, in substance, that he desired to ride to Bessemer, when plaintiff was told by defendant's conductor that the fare to Bessemer was twenty cents (20) when paid to him in cash. And the defendant further avers that plaintiff refused or failed to pay the extra fare demanded by its conductor, and its conductor thereupon ejected plaintiff from the train, using no more force in ejecting plaintiff than was necessary. (5) The defendant, for a further answer to the complaint in this cause, and for further answer to each and every count of said complaint, separately and severally, says that at the time of the wrongs and grievances therein complained of, and for a long time prior thereto, it had in force and effect a rule or regulation requiring passengers from Birmingham to Bessemer who were not provided with a ticket entitling them to passage from Birmingham to Bessemer to pay twenty (20) cents for such passage. And the defendant avers that plaintiff boarded one of its trains in Birmingham, and produced no ticket to its conductor, and offered but the sum of fifteen (15) cents for passage from Birmingham to Bessemer. The defendant further avers that its conductor demanded of plaintiff the sum of twenty cents (20) for his fare, which plaintiff failed or refused to pay, whereupon defendant's conductor, after permitting plaintiff to proceed on his journey as far as his fifteen cents entitled him to

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proceed, ejected plaintiff from the train; and, in ejecting plaintiff, defendant avers that its conductor used no more force than was necessary." To the fourth and fifth pleas, respectively, the plaintiff demurred upon the following grounds: (1) Because it is not averred that defendant had tickets for sale at the place in Birmingham where plaintiff got on said train; (2) because it is not averred that said conductor did not threaten plaintiff with arrest, as alleged in said complaint; (3) because it is not averred that defendant had tickets for sale at points from which it demanded additional fare from passengers without tickets; (4) because it is not averred that said conductor had tickets for sale; (5) because it is not averred that defendant offered plaintiff a reasonable opportunity to purchase a ticket before boarding said car at said place he boarded it. These demurrers were overruled. On the trial of the case the averments of the complaint were substantially proved by the evidence. It was further shown by the defendant that it kept its tickets on sale at a certain place which was $2\frac{1}{2}$ blocks from where plaintiff boarded defendant's car; that the rules and regulations of the company fixed the fare from Birmingham to Bessemer at 15 cents when a passenger purchased a ticket, and further provided that where a passenger failed to purchase a ticket the fare was 20 cents. After the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its behalf. To the giving of this charge, the plaintiff duly excepted.

John W. Tomlinson, for appellant.

Walker, Tillman, Campbell & Walker, for respondent.

TYSON, J. Substantially but one question is presented by this record. It is the reasonableness of a regulation of defendant company requiring the plaintiff, as a passenger, to pay in cash a greater sum than is charged by it for a ticket between the same points. It is shown both by the averments of counts 1 and 2 and by the evidence that the car boarded by plaintiff stopped at or near the intersection of certain streets in the city of Birmingham for the purpose of taking on passengers, and that defendant had no depot or agent or tickets for sale at that point. The point was designated by the defendant's conductor, in his testimony, as a flag station. It is true that the evidence discloses that the defendant had a depot, ticket agent, and tickets on sale in the city of Birmingham at a point some $2\frac{1}{2}$ blocks (about 1,000 feet) from the point where the plaintiff boarded the car. All the cases agree that carriers of passengers may require persons to purchase tickets before taking passage on their cars, and to this end may adopt a rule or regulation establishing a higher rate to be paid the conductor than the rate charged for a ticket. But to justify a discrimination in the rates, the carrier must provide the proper facility and accommodation for so purchasing the

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ticket. If the carrier fails to give the passenger a convenient and accessible place and an opportunity to buy his ticket before entering the car, the regulation is unreasonable and void, and is no defense to an action brought by the passenger for his ejection by the conductor after he has paid the ticket rate. 25 Am. & Eng. Ency. Law (1st Ed.) 1104-5; Redfield on Railways, 104, 105, and note; Elliott on Railroads, § 200; Reese v. Pa. R. Co., 134 Pa. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818; Sage v. Evansville R. Co., 134 Ind. 100, 33 N. E. 771; Swan v. Manchester R. Co., 132 Mass. 116, 42 Am. Rep. 432; Pullman Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Snellbaker v. P. R. Co., 94 Ky. 597, 23 S. W. 509. This principle was clearly recognized and enforced in Evans v. M. & C. R. Co., 56 Ala. 246, 28 Am. Rep. 771, which was an action for damages by a passenger of a mixed train, operated by defendant, carrying both freight and passengers, on account of ejection by the conductor after a tender of the amount of the fare, where it was held that a railroad company, as a common carrier, may make reasonable rules for the regulation of the business and the performance of its public duties; but, in the adoption of these rules, regard must be had to the convenience and interest of the traveling public. It may forbid the transportation of freight and passengers on the same trains, or may require passengers traveling on freight trains to procure tickets before entering the cars; but, in such case, reasonable facilities for procuring tickets at or about the time of the arrival or departure of the trains must be afforded, according to the established usage of all railroads, and it is not reasonable, while allowing passengers to travel on freight trains, to afford them no opportunity to procure tickets except at such hours as would make it more expeditious to travel by the passenger trains. Applying the general principle stated above, it was held in Phettiplace v. The Northern Pacific R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483, that a passenger going upon a train at a station at which tickets are not sold cannot lawfully be charged more than the regular fare because of his not having a ticket. Likewise, in Poole v. Northern Pacific R. Co., 16 Or. 261, 19 Pac. 107, 8 Am. St. Rep. 289, it was decided that a company which had provided a station without a ticket office, and at which its passenger trains stop, has not put it in the power of the traveler to comply with such rules, and such rules would be unreasonable, as applied to such stations or to such traveler, when he offered to pay the usual fare. If the railroad company has failed or neglected to furnish the traveler the opportunity to procure a ticket, and he applies for a passage or enters the train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him. In Sternberg v. State (Neb.) 54 N. W. 553, 19 L. R. A. 570, it is said: "A street railway has no depots. Its stopping places are on each street corner, and it transacts its business with

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the public in its cars, and its tickets should be kept for sale where it transacts its business with the public."

We do not think that the plaintiff, under the facts of this case, should have been required to go $2\frac{1}{2}$ blocks to purchase a ticket before boarding the car of the defendant at a flag station, in order to have the benefit of the ticket rate. If defendant desires to enforce the rule or regulation at all points along its line where it receives passengers for transportation, it should have tickets on sale at those points. The keeping them for sale at one station will not justify its discrimination against passengers who take passage at other and different stations. The several rulings of the trial court are not in harmony with these views.

Reversed and remanded.

FULMER v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, July 29, 1903.*)

[45 S. E. Rep. 196.]

Carriers—Passenger Fares—Tickets—Failure to Purchase—Excess Fare.*

That passengers were afforded an opportunity to purchase tickets at regular ticket offices before boarding trains, did not authorize a railroad company to charge passengers boarding trains without tickets an excess fare of 25 cents over the maximum rate fixed by statute.

Jones and Woods, JJ., and Townsend and Gage, Circuit Judges, dissenting.

In banc. Appeal from Common Pleas Circuit Court of Newberry County; Jas. F. Izlar, Special Judge.

Action by Samuel C. Fulmer, by his guardian ad litem, against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Johnstone & Welch, for appellant.

T. P. Cothran, for appellee.

GARY, A. J. The only question presented by this appeal is whether his honor the presiding judge erred in charging the jury as set forth in the appellant's sole exception, which is as follows: "Because he erred in charging the jury that the defendant had the right to demand and collect of the plaintiff an excess fare of twenty five-cents, if the plaintiff tendered his fare in money on board of the train after an opportunity had been given him to purchase a ticket at the regular ticket office of the defendant; and that it had the right, if the plaintiff refused to pay this excess fare, to eject him from its train, although the plaintiff had tendered the fare at three cents per mile for every mile he proposed to travel." Before proceeding to discuss this question, it may be well to review the legislation upon the subject of railroad fares for the transporta-

*See preceding case and foot-note.

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tion of passengers. Prior to the act of 21st December, 1882 (18 St. at Large, p. 10), there had been no general legislation in this state on this subject. Under the common-law rule governing common carriers of passengers, the railroads were required to charge reasonable rates for transportation, but were not otherwise limited in fixing the rates for transportation. *Ex parte Benson*, 18 S. C. 38. The act of 1882 placed the whole subject of freight and passenger rates under the control of the railroad commissioner, who was required to "make reasonable and just rates of charges for freight and passenger carriage, to be observed by all railroad companies doing business in this state on the railroads thereof." This act was amended by the act of 24th December, 1883 (18 St. at Large, p. 485), as follows: "Section 7. That the following section be inserted in the General Statutes of this state, to be known as section 1451f: From and after the passage of this act, no railroad company in this state operating, owning or controlling any line of railroad whose passenger earnings exceed \$1,200 per mile of road per annum, shall charge more than three cents per mile for each passenger, with 100 pounds of baggage. On roads whose passenger earnings are over \$700 and not more than \$1,200 per mile per annum, the rate shall not exceed three and one-half cents per mile, except the Charleston and Savannah Railway Company, which shall have the right to charge four cents per mile for first and three cents per mile for second class passengers. On roads whose passenger earnings do not exceed \$700 per mile per annum, such rate shall not exceed four cents per mile. The charge for children under twelve and over six years of age shall not exceed two cents per mile. Each railroad shall also run a second class or smoking car for passengers, in which they shall sell tickets at a rate not to exceed two and one-half cents per mile on the first class and three cents per mile on the second and third class of railroads as above prescribed: provided, that railroad corporations may charge for short distances where the charge by the mile would be less than twenty-five cents, the sum of twenty-five cents for the first class passage and fifteen cents for the second class passage, and children for such distances. The provisions of this section shall not prevent railroads from issuing thousand mile, excursion, commutation and season tickets at a lower rate than is herein provided."

This act was again amended by the act of 24th December, 1884 (18 St. at Large, p. 759), which, after making changes with regard to the rates fixed by the act of 1883, provided as follows: "Section 2. That section 1451f (A. A. 1883, p. 485-6), be amended by adding at the end thereof the following: And railroad companies shall have the right to charge twenty-five cents extra when the fare is not more than two and 50-100 dollars, and fifty cents when it is over that amount in all cases where passengers who get on at stations where tickets are

offered for sale, neglect or refuse to purchase tickets: provided, this shall not apply to passengers on accommodation trains: provided further, that offices for the sale of such tickets shall in all cases be open not less than thirty minutes before the time fixed for the departure of trains." 18 St. at Large, p. 760.

On 19th of December, 1892 (21 St. at Large, p. 8), an act was passed providing for the election of three railroad commissioners. Section 5 of that act provides "that the commissioners elected as hereinbefore provided shall, as provided in the next section of this act, make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in this state on the railroads therein." Section 6 of the said act contains the provision "that the said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freights and cars, on each of said railroads."

In 1896 an act was passed (22 St. at Large, p. 116), the first section of which was as follows: "Section 1. That from and after the passage of this act, the rates of transportation of passengers by railroad companies chartered and doing business in this state shall be for first class fare, three and one-fourth cents per mile for every mile traveled, and for second class fare, two and three-fourths cents per mile for every mile traveled, and shall sell first and second class tickets: provided, this rate may from time to time be altered and changed by the railroad commission as to any railroad or railroads as in the judgment of said railroad commission the circumstances of such railroad or railroads may warrant or require." This act contains the usual repealing clause, and was approved on the 9th of March.

The last enactment on the subject is the act of 1900 (23 St. at Large, p. 457), the third section of which is as follows: "Section 3. That sixty days after the approval of this act the rate for transportation of passengers on all railroads to which the provisions of this act shall apply shall not exceed three cents per mile for every mile traveled, and such railroads shall not be required to have second class coaches or to sell second class tickets." This act also contains the usual repealing clause.

The defendant introduced in evidence the following circulars:

"(Circular No. 32.) Office of Railroad Commissioners, Columbia, S. C., August 13th, 1894. On and after August 17th, 1894, the railroads of this State are hereby authorized to charge passengers twenty-five cents extra where fare not more than two 50-100 dollars, and fifty cents where it is over that amount, in all cases where the passengers get on at stations

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where tickets are offered for sale, neglect or refuse to purchase tickets: Provided, That offices for sale of such tickets shall in all cases be open not less than thirty minutes before the time fixed for the departure of trains. By order of the Board. D. P. Duncan, Chairman. M. T. Bartlett, Secretary."

"(Circular No. 37.) Office of Railroad Commissioners, Columbia, S. C., May 4th, 1895. On or after June 10th, 1895, Circular No. 32, issued by the board 17th August, 1894, shall have added thereto the following: Provided, That the conductor shall give the passenger a return check for the amount of excess charged, to be redeemed upon presentation at any ticket station of the company. W. D. Evans, Chairman. D. P. Duncan, Secretary."

"(Circular No. 42.) South Carolina office of Railroad Commissioners, Columbia, S. C., April 2, 1896. To enable the railroad companies operating in this State to prepare and promulgate their passenger rate sheets in accordance with the act of the General Assembly, approved March 9th, 1896, and the action of this commission pursuant thereof, the passenger rates now in force will be continued until the first day of May next. On and after that date the following rates will be enforced by the commission on the railroads doing business in South Carolina, to wit: Three and a quarter cents ($3\frac{1}{4}$ cents) per mile for first class fare; two and three-quarter cents ($2\frac{3}{4}$ cents) per mile for second class fare, on the following roads:
* * * On all railroads a half fare of not more than two cents per mile for children under twelve years old or over six years of age shall be charged. No railroad company shall be allowed to charge more than ten cents as a minimum, full or half rate between regular stations, when the fare would be less than that amount. The fare should always be made that multiple of five or nearest reached by multiplying the rate by the distance. In addition to these rates, passengers unprovided with tickets, when opportunity has been afforded them by the railroads to procure the same, may be required by the railroads to pay to the conductor twenty-five cents (25 cents) excess of the fare, upon receiving from the conductor a draw back ticket for the twenty-five cents, which shall be cashed on presentation at any ticket office of the company within twenty days after date. This circular supersedes all other circulars in conflict. W. D. Evans, Chairman. D. P. Duncan, Secretary."

The following circular was also introduced in evidence:

"Southern Railway Company, Passenger Department, Circular No. 1900-3, Superseding Circular No. 797, File No. 42, 226, Washington, D. C., January 27, 1900—Rebate Ticket in South Carolina. To all conductors and ticket agents in South Carolina: Conductors have been supplied with rebate tickets, Form C. R. C., a fac simile of which is printed below, for use under the following instructions: A rate 25 cents

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higher than agent's rate should be charged for each fare collected in cash between any two stations within the State of South Carolina, under the rules governing the collection of conductor's rates.

"A rebate ticket, Form C. R. C., should be issued to the passenger for each excess cash fare collected between any two stations within the State of South Carolina. These tickets should be written up to show: (a) Name of conductor. (b) Points between which fares are collected. (c) Train number, and punched to show date of issue, whole or half fare and amount collected, as designated. The duplicate ticket should be examined carefully to see that it agrees with the original and forwarded to the ticket auditor with report of cash fare collections. Special attention is called to the fact that these rebate tickets are to be issued exclusively for rebate fares collected within the State of South Carolina, and are not to be issued for fares collected between interstate points, nor are they to be issued for fares collected at agent's rates within the State of South Carolina, which do not require a rebate.

"Conductors will continue to use the Blanchard form of cash fare receipt for fares collected at agent's rates and between interstate points.

"The excess rate of twenty-five cents will be refunded to passengers upon the surrender of the original rebate ticket to any ticket agent within the State of South Carolina within twenty (20) days after date of issue cancelled on the margin.

"Ticket agents should stamp all rebate tickets redeemed and forward the same to ticket auditor with report, Form 1950, at the end of each month. The total amount of this report should be entered on credit side of Summary Passenger Traffic, Form 1684, opposite heading, 'Excess Cash Fares Refunded.' "

As the act of 1900 provides that the rate for transportation of passengers shall not exceed three cents per mile for every mile traveled, it will at once be seen that the important question to be determined is whether the requirement that the passenger should pay an excess fare of 25 cents when he neglects to purchase a ticket is inconsistent with the statute by reason of the fact that such requirement would be regarded as an extra charge. It cannot now be successfully contended that the defendant had the right, under the act of 1884 hereinbefore mentioned, to charge the excess fare; for the case of *Kibler v. Ry. Co.*, 62 S. C. 252, 40 S. E. 556, decides that it was repealed by the act of 1900. The general rule as to the payment of fare on the train is thus stated in 25 A. & E. Enc. 1104: "A railroad company may establish a rate of fare, for passengers failing to provide themselves with tickets before entering the train, higher than the ticket rate, the extra charge being regarded as a compensation to the company for the additional inconvenience to which it is subjected by being compelled to receive the fare by the hands of the conductor.

* * * But the car rate can in no case exceed the maximum allowed the company by its charter or a statute fixing rates."

What was the object of the Legislature in repealing the act of 1884? It was unquestionably for the purpose of depriving the railroad company of the power to enforce the collection of excess fares, whether the money went permanently or temporarily into the treasury of the company. One of the definitions of the word "charge," in A. & E. Enc., 889, is as follows: "'Charge' is the price required or demanded for services rendered, or, less frequently, for goods supplied." This definition is approved in *Reese v. Penn. R. R. Co.* (Pa.) 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818, which is the main case upon which defendant relies to sustain the proposition that the excess fare is not a charge. In that case the court says: "'Charge' is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society gives it twenty-seven principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions one (106) is, 'The price required or demanded for services rendered, or (less usually) for goods supplied,' and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted, or taken from the traveler as compensation for the services rendered, and, of course, something taken permanently, not taken temporarily and returned." The reasoning of the court in the case last mentioned is fallacious in making the price, or something required, exacted, or taken from the traveler, to depend upon the fact that it is taken permanently, not temporarily and returned. In order to show that this is not the correct test, it is only necessary to say that if the rebate check had provided that the excess fare should be refunded after a certain number of days, months, or years, it would at once appear that the railroad company had received more than three cents per mile for every mile traveled, as the use of the money is a valuable consideration. If the railroad company had adopted a rule that a passenger should not be permitted to board its train or check his baggage until he exhibited a ticket, it might well be contended that this was a mere regulation; but not so when the passenger is required to pay more money for his transportation than is permitted by the statute, even though under certain circumstances he may have the excess charges refunded to him. In the case of *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, the court says: "It is a well-settled principle that, when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight." Let us therefore see in what light the defendant has construed the charges for excess

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fare in its instructions to its conductors and ticket agents in South Carolina hereinbefore mentioned. The circular shows that the defendant has two rates for transportation of passengers—a conductor's rate and an agent's rate. It also refers to the conductor's rate as a charge. It also speaks of 25 cents excess cash fare, thus showing that the defendant did not regard the excess charge as a mere regulation. Another significant fact disclosed by the circular is the following direction to conductors: "Special attention is called to the fact that these rebate tickets are to be issued exclusively for excess fares collected within the state of South Carolina, and are not to be issued for fares collected between interstate points, nor are they to be used for fares collected at agent's rate within the State of South Carolina which do not require a rebate." This shows that the defendant had in view the financial benefit to be derived from charging excess fares.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

POPE, C. J., and ALDRICH, GARY, KLUGH, DANTZLER, and PURDY, Circuit Judges, concur.

GARY, A. A. J. I concur in the opinion of Mr. Justice Gary for the following reasons: The relation between the carrier and passenger is contractual. The carrier, being a party to the contract, is clothed with great authority in saying when and upon what terms he will enter into the relation of carrier of passengers. For instance, the carrier has the authority to say to the public, "before this relation shall exist between us, you must provide yourself with a ticket," and, until this requirement has been complied with by the would-be passenger, the carrier would have the right to refuse him admittance upon its cars. The exercise of such power would simply be the enforcement of a reasonable rule and regulation. In the case at bar, however, we find no such rule or regulation. We find the carrier permitting the public to board its trains as passengers either with or without a ticket. In this case, clearly, the relation of carrier and passenger existed at the time the plaintiff tendered to the conductor of defendant's train the full fare provided by statute. And, when the conductor of such train exacted from the passenger any sum in excess of the maximum fare provided by statute, he exceeded his authority, for the reason that he was exacting of the passenger more than the statute authorized. What, then, was the passenger's right? It was to pay or tender to the agent of the defendant the maximum charge fixed by the statute and be transported to his destination.

DUFUR v. BOSTON & M. R. Co.*(Supreme Court of Vermont, Orange, Feb. 9, 1903.)*

[53 Atl. Rep. 1068.]

Duty to Protect Passengers against Strangers.*

Where plaintiff alleged that he was a passenger on defendant's train, and that defendant ran its car on a side track, and, while it stood there with plaintiff therein, defendant allowed and caused one A., who maintained a rifle range near the track, to shoot his rifle towards and into the car, by reason of which plaintiff was injured, defendant and A. were jointly liable for the negligence whereby plaintiff was injured.

Joint Tort Feasors—Release of One.

A plea charging that plaintiff had previously sued A., a joint tort feasor, for the tort charged in the declaration, and had settled with him therefor, and released him from liability, stated a valid defense.

Exceptions from Orange county court; Rowell, Judge.

Action by H. M. Dufur against the Boston & Maine Railroad Company. From a pro forma decree overruling plaintiff's demurrer to defendant's pleas, plaintiff brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, STAFFORD, and HASELTON, JJ.

David S. Conant and R. M. Harvey, for plaintiff.

Young & Young, for defendant.

TYLER, J. The first count in the declaration alleges, in substance, that the defendant was a common carrier of passengers over its railroad; that it received the plaintiff, on payment of his fare, to carry him safely from Bradford to White River Junction; that it neglected its duty, by running the car in which he was a passenger upon a side track before the train reached the latter place, and allowing it to stand there for a long time; that the plaintiff had no opportunity to leave the car, but, by the defendant's direction, through its officers and agents, remained therein; that one Allen, with the defendant's knowledge and permission, then kept, and for a long time before had kept, a target for rifle practice, in such a situation, in respect to the car, that a bullet from his rifle might and would pass into the car; that the defendant knew that Allen was engaged in firing at said target directly towards the car; and that the plaintiff, without negligence on his part, was struck by a bullet from Allen's rifle, and injured. The second count only differs from the first in alleging that the defendant allowed and caused Allen to shoot his rifle towards and into the car, that the car was defective in its construction, and that, by reason thereof, when the plaintiff was hit by the

*See foot-note to *Houston & T. C. R. Co. v. Phillio* (Tex. Civ. App.), 4 R. R. R. 311, 27 Am. & Eng. R. Cas., N. S., 311; monograph appended to *Savannah, etc., Ry. Co. v. Boyle* (Ga.), 6 R. R. R. 430, 29 Am. & Eng. R. Cas., N. S., 430; foot-note appended to *Fewings v. Mendenhall* (Minn.), 6 R. R. R. 422, 29 Am. & Eng. R. Cas., N. S., 422.

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bullet he was thrown down and injured. The defendant, in its fourth plea, sets up in defense to the action that soon after the plaintiff received his injuries, as alleged, he brought a suit against Allen to recover damages therefor, which suit was entered in Windsor county court; that Allen entered an appearance, and afterwards settled with the plaintiff, and paid him a large sum of money, which the plaintiff received and accepted in full settlement, satisfaction, and discharge of all causes of action in the declaration mentioned, and gave him a written release, under seal, of all such causes of action. This plea sets out the declaration in the Allen suit, the first count of which is in trespass for a common assault; the second, for an assault by shooting at the plaintiff with a loaded rifle and injuring him; the third, in case, alleging negligent handling and shooting of the rifle, whereby the plaintiff was hit and injured. It recites the release, and alleges that the causes of action in the two suits were identical. The fifth plea admits the placing of the car, with the plaintiff therein, upon the side track, and alleges a necessity for so doing, in that the main track was then temporarily occupied by other cars; denies all knowledge of Allen's intention to shoot on the occasion alleged; admits his shooting, but says it was without the defendant's consent or knowledge, and against its will; alleges that the bullet struck a knot in a post at which Allen fired his rifle, glanced to the car, and hit the plaintiff, and that its hitting the car and the plaintiff was accidental; that Allen did not anticipate, and had no reason to anticipate, an injury to any person. This plea also alleges a settlement and release. To these pleas the plaintiff demurred generally. The defendant relies upon the settlement and release as a bar to the action.

The plaintiff contends that the fourth plea is insufficient; that it appears upon its face that the causes of action in the two suits were not the same; that the allegation of identity in the fourth plea is inconsistent with the facts set out in the declaration in the Allen suit, in which it was alleged that Allen willfully and negligently shot and injured the plaintiff, but that it contained no allegation that the defendant was in fault in connection with Allen, and jointly liable with him; that, upon the declaration and pleas in this case, Allen was not a wrongdoer, but a stranger to the cause of action set out in the declaration; that, even if he were guilty of negligence, he did not assume to settle for the defendant's wrongful act; and that the payment and release did not affect the defendant's liability. The plaintiff says that the defendant relies upon one set of facts to bar this action, but requires the plaintiff to answer other facts inconsistent with those pleaded in bar. The plaintiff makes substantially the same claim in respect to the fifth plea. His contention is, in brief, that his suit against Allen was only for the latter's wrongful act, and that therefore the settlement and release did not affect the

defendant's liability; that this suit is for the defendant's wrongful act; that neither the declaration nor the pleas charge that Allen and the defendant joined in the act; and that the two suits were for different causes. The position cannot be maintained, that, upon the facts alleged in the declaration, Allen could not have been liable either to the plaintiff or the defendant. His act may have been unlawful, though the defendant permitted or even caused him to commit it. If his act was negligent, it is immaterial whether it was done at his own instance or by the defendant's procurement. Upon the allegations in the declaration, the plaintiff clearly had a right of action against the defendant, whether Allen was liable or not; and, to defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability. In that case the payment by Allen would be the act of a stranger to the cause of action. But upon the facts alleged in the declaration,—that the defendant ran its car upon the side track, and while it stood there, with the plaintiff therein, by its directions allowed and caused Allen to shoot his rifle towards and into the car,—the defendant and Allen were jointly liable for negligence, whereby the plaintiff was injured. The case comes within the rule cited by the defendant from *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533, and applies to both wrongdoers: "If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence." The allegations in the fourth plea of payment, settlement, satisfaction, and discharge, the truth of which the demurrer admits, are a bar to this suit. The defendant's act in placing the car upon the side track gave the plaintiff no cause of action, and Allen's act would have been harmless if the car had not stood upon the side track. It was the concurrence of the two acts that caused the plaintiff's injury. Therefore he had a right of action against either wrongdoer, or against both jointly,' and in either case he would have been entitled to full compensation for his injury. He elected to sue and settle with Allen, and he discharged the cause of action in express terms, which released both wrongdoers from further liability. The plaintiff could have only one satisfaction for his injuries. *Eastman v. Grant*, 34 Vt. 387; *James v. Aiken*, 47 Vt. 23; *Cooley, Torts*, 139; *Jaggard, Torts*, § 117, states the rule: "While separate suits may be brought against several defendants for a joint trespass, and while there may be a recovery against each, there can be but one satisfaction. It is immaterial whether the satisfaction is obtained after judgment, or by amicable adjustment, without any litigation of the claim for damages. The essential thing is the satisfaction.

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Therefore, where a passenger, injured in a street car collision, for a sum paid, released the carrier company from all liability for the injury, he thereby discharged the liability of the other company also. The rule was applied notwithstanding evidence that the other company was really to blame, and although the right of action against it was expressly reserved. The reasoning of the English cases is that the cause of action against joint tort feors is one and indivisible, and, having been released as to one person, consequently is released as to all persons otherwise liable. The American cases recognize one satisfaction as a bar to suit against joint tort feors. When the cause of action is once satisfied, it ceases to exist." The defendant, in its fifth plea, states an apparent necessity for the cars standing upon the side track; avers that on this occasion it had no reason to apprehend that Allen would shoot in that direction; and that, from the situation of the car and the target, Allen had no reason to anticipate that any person would be injured by his shooting; and denies that either the defendant or Allen was negligent. The plea is, in legal effect, the general issue. All the facts therein alleged may have existed, and the defendant and Allen not have been in the exercise of the care of a careful and prudent man. If Allen was in the habit of using this space for target practice, and was so using it on this occasion, it is a question of fact whether the defendant's officers and agents, in the exercise of the high degree of care required of carriers of persons, ought not to have known of and guarded their passengers from injury; and, though Allen had no reason to anticipate danger to any person by shooting across this space, a careful and prudent man, placed in Allen's position, might have anticipated danger. But the fact that the fifth plea amounts to the general issue cannot be taken advantage of by general demurrer. *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679; 1 Ch. Pl. 527, 528.

The pro forma judgment overruling the demurrer to the fourth and fifth pleas, and holding those pleas sufficient, is affirmed, and cause remanded.

FRIZZELL *v.* OMAHA ST. RY. CO.

(*Circuit Court of Appeals, Eighth Circuit, July 27, 1903.*)

[124 Fed. Rep. 176.]

Trial—Instructions—Rules Applicable to Facts of Case.

Instructions to the jury should be limited to the facts of the case on trial, and to the rules of law which apply to those facts, and which govern the real issues they present, and neither theories which there is no evidence to sustain, nor rules of law which are inapplicable to the evidence actually presented, should be embodied in the charge.

Same—Exception to Correct Charge—Requests Requisite.

Where there is no error in the charge given, the omission to give other rules of law or to state other facts is not effectively challenged by a mere objection or exception to the instructions. An effective presentation of

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the question can be made only by a suitable request to the trial court to embody the rules or facts omitted in its instructions, and a failure to make such request is a waiver of any error inherent in the omission.

Same—Charge Which Applies Law to Facts Established Preferable to Abstract Rules or Sound Theories.

A charge which applies to the facts of the case in hand the rules of law which govern the issues, and clearly states to the jury the crucial questions which they must answer, is much more helpful to them, and conduces far more to a just administration of the law, than abstract propositions of law or dissertations on sound theories, concerning the application of which to the issues they are to decide the jury is left in doubt.

Carriers—Negligence—Evidence—Competency of Rule.*

On the trial of a charge of negligence in the operation of a street car, a rule of the company which directs the method of operation in respect of which complaint is made is competent evidence.

Error without Prejudice—Facts.

Error without prejudice is no ground for reversal. The court erroneously rejected two rules of the defendant company, which were offered by the plaintiff, to the effect that after a car is stopped it should not be started when any passenger is alighting or attempting to do so, and that it should be only sent forward on a signal from the conductor: *held*, that this error did not prejudice, and could not have prejudiced, the cause of the plaintiff, in view of the fact that the court peremptorily instructed the jury, as a matter of law, that if the car was started after it had stopped, and while the plaintiff was alighting, she was entitled to their verdict.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

C. J. Smyth (Ed. P. Smith, on the brief), for plaintiff in error.

John L. Webster, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff, Agnes Frizzell, brought an action against the defendant, the Omaha Street Railway Company, for \$25,300 damages for negligence in the operation of one of its cars upon which she was a passenger, which she alleged inflicted serious injury upon her person. She averred in her petition that while she was riding upon this car it came to a complete stop; that she then arose from her seat and stepped upon the running board, which extended along the side of the car, and was in the act of alighting; that the conductor of the car saw her thus alighting, and that while she was doing so the defendant suddenly started the car, and brought her violently to the ground. The defendant answered that the car did not stop at the time the plaintiff arose from her seat to alight or at the time she alighted, and that it did not start suddenly forward during these times, but that it was moving slowly over the near cross-walk of a street crossing to enable the motorman to

*See note appended to *Smithson v. Chicago G. W. Ry. Co.* (Minn.), 11 Am. & Eng. R. Cas., N. S., 726.

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turn a switch over which it was about to pass, that the plaintiff stepped off the car when it was thus moving, and that a rule of the company required its employees to pass to the farther cross-walk of a street crossing before permitting the car to stop to allow passengers to enter it or to withdraw from it. The witnesses for the respective parties testified to the facts set forth in the pleadings of the parties who called them, and at the close of the testimony the evidence was uncontradicted (1) that the conductor had charge of the car; (2) that he saw the plaintiff as she arose from her seat and as she alighted; (3) that he knew she was doing so; (4) that the car was passing, or about to pass, over a switch which the motor-man was required to turn at the near cross-walk of a street crossing when the plaintiff alighted; and (5) that a rule of the company required the employees to take their car to the farther cross-walk of a street crossing before stopping it to permit passengers to alight. The witnesses for the plaintiff generally testified that the car stopped, and that it was its sudden start from its stationary position that caused the accident. The witnesses for the defendant gave evidence that the car did not stop, that there was no sudden increase of speed, movement, or jolt of the car, but that the plaintiff stepped off while it was slowly moving upon or over the switch. There was no evidence that there was any sudden increase of speed, jolt, or movement of the car while it was moving. The only evidence of a violent movement was the testimony of the witnesses who said that it came to a stop, and that it suddenly started forward from this stationary position.

The court instructed the jury (a) that the burden of proof was upon the plaintiff to establish that the car stopped, and that it was suddenly started while the plaintiff was alighting; (b) that if it was thus stopped, and, while she was getting off, the car started up, and the conductor or party in charge of the car knew that she was in the act of getting off when the car started, she was entitled to their verdict; but (c) that if, at the time she attempted to get off and while she was getting off, the car had not stopped, but was still moving forward, then their verdict must be for the defendant; and that "your first inquiry naturally when you retire to your jury room is, what was the fact as to whether the car was in motion at the time she attempted to get off and while she was attempting to alight from the car? If it was not in motion, had come to a stop, and the conductor knew that she was in the act of getting off, and the car started up again while she was in the act of getting off, and she was exercising due care in getting off, in the manner of getting off, and by the reason of the car thus starting she was thrown to the pavement and sustained injuries, I say she is entitled to recover."

These instructions are challenged by counsel for plaintiff upon various grounds. They insist that it was error for the

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court to tell the jury that the plaintiff was only entitled to recover if the car first stopped, and was then started forward while she was alighting. They cite many instances where persons injured by sudden changes in the speed of moving cars from which they were debarking have been permitted to recover, and they earnestly urge that the court below should have charged the jury that, even if the car was moving when the plaintiff alighted, she was entitled to recover if she was thrown to the ground and injured by a sudden and violent increase of speed, movement, or jolt of the car. It is conceded that cases may and do arise in which it is permissible to submit to the jury the question whether or not a railroad company is negligent in suddenly increasing the speed of a moving car while a passenger is in the act of alighting from it. But that rule of law had no relevancy to this case, and any attempt to have applied it to the facts which this record presents would have been palpable error, because the plaintiff made no such charge in her complaint, because no such issue was presented or tried, and because there was no substantial evidence to sustain such an averment at the trial.

Instructions to the jury should be limited to the facts of the case on trial, and to the rules of law which apply to those facts and govern the actual issues which they present, and neither theories which there is no evidence to sustain, nor principles of law which are inapplicable to the evidence actually presented, should be embodied in the charge of the court. There is no evidence in this record which would sustain a finding of a jury that the plaintiff was injured by the sudden increase of the speed, the sudden jolt or movement of a moving car while she was alighting from it, and the refusal of the court to permit the jury to find a verdict for the plaintiff on that theory was right, and was the only course that could have been sustained upon the evidence in hand.

The next criticism of the instructions is that in one place in the charge the court told the jury that if the car was suddenly started from a stationary position while the plaintiff was getting off, "and the conductor or party in charge of the car knew that she was in the act of getting off when the car started," she was entitled to a verdict against the defendant as a matter of law. It is contended that this instruction submitted to the jury the question whether the conductor or some other party was in charge of the car when the evidence was uncontradicted that the conductor alone was in charge, and that the result of this submission was that the jury were permitted to defeat the plaintiff by finding that some other person was in charge of the car who did not know that the plaintiff was alighting at the time she received her injury. This objection is certainly ingenious and subtle, but it is neither cogent nor convincing. It is plain that the words, "or other party in charge of the car," fell from the lips of the judge through abundance of caution, and for the purpose of

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making it clear beyond question to the jury that if the party in charge of the car knew, whoever he was, that this plaintiff was alighting from the car when it was started, the defendant was liable for her injury. If the court had omitted to mention the conductor, and had simply informed the jury that if the party in charge of the car knew that the plaintiff was alighting she could recover, there would have been no color or pretense of reason for this complaint, because the jury must have found, in accordance with the uncontradicted evidence, that the conductor was the party in charge of the car, and that he knew that the plaintiff was alighting. In a later part of the instructions, the court repeated this portion of the charge with the words, "or other party in charge of the car," omitted. He there directed the jury to return a verdict for the plaintiff if the car was started when she was alighting, "and the conductor knew that she was in the act of getting off." In view of this part of the charge, and of the fact that the evidence was uncontradicted that the conductor alone was in charge of the car, it is clear beyond doubt that the earlier part of the instructions upon this subject at which this criticism is leveled did not result, and could not have resulted, in any prejudice to the cause of the plaintiff. The conclusion that the plaintiff's cause could have been injured by this portion of the charge can be reached only by presuming that the jury found in contradiction of the undisputed evidence in the case and in violation of their oaths that some other party than the conductor had charge of the car, and that they also disregarded the positive direction of the court upon the subject under consideration in the later portion of its charge, to which attention has been directed. Such a presumption is too violent and irrational for any appellate court to indulge, and this objection to the instructions cannot be sustained.

Finally, grave complaint is made of the fact that the court charged the jury that the plaintiff was entitled to a verdict if after the car was stopped, and while she was alighting, it was suddenly started, and if the conductor knew that she was alighting when the car started. The objection here urged is that the company was liable in the case stated by the court not only if the conductor knew that the plaintiff was alighting when the car was started, but also if by the exercise of reasonable care he could have known that fact. But this question is not here for our consideration. There was no error in the instructions which the court gave. It is beyond doubt that the company was liable to the plaintiff in the case which the court stated to the jury if the conductor knew that she was getting off the car when it was started. Conceding that the defendant was also liable if by the exercise of reasonable diligence the conductor, or any other employee of the company, could have known that fact, counsel for the plaintiff did not request the court at the trial to give to the jury this latter rule, nor did he in any way call the attention of

the court to it. Nor is the reason for their silence past finding out. They had alleged in their petition that the conductor saw the plaintiff alighting, they had proved that fact by their witnesses, and the witnesses of the defendant had admitted it. They were trying their case on the theory that the knowledge of the conductor was a potent fact in their favor, so that they had no cause to seek an instruction upon a state of facts of which there was no evidence, a state of facts under which the conductor did not know, but ought to have known, that the plaintiff was alighting from the car when it started. This was the reason why they asked no instruction upon the latter theory.

However that may be, the only basis for their complaint regarding the portion of the charge now under consideration is a bare exception to it which specifies no grounds or reasons for the challenge. There was no error in the charge as it was given. No request was preferred to the court to give the additional rule of law of the omission of which complaint is now made, and the failure to give it was not, therefore, reversible error. Where there is no error in the charge given, the omission to give other rules of law or to state other facts is not challenged by a mere objection or exception to the instruction. An effective presentation of the question suggested by the omission can be made only by a suitable request to the trial court to embody the rules or facts omitted in its instructions, and a failure to make such a request is a waiver of any error inherent in the omission. *Chicago G. W. Ry. Co. v. Healy*, 30 C. C. A. 11, 16, 86 Fed. 245, 250; *Pennock v. Dialogue*, 2 Pet. 1, 15, 7 L. Ed. 327; *Texas & Pac. Ry. v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, 38 L. Ed. 78; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853; *Humes v. U. S.*, 170 U. S. 210, 211, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Shute v. Thompson*, 82 U. S. 151, 164, 21 L. Ed. 123; *Express Co. v. Kountze Bros.*, 75 U. S. 342, 353, 19 L. Ed. 457; *Mutual Life Ins. Co. v. Snyder*, 93 U. S. 393, 394, 23 L. Ed. 887; *Carter v. Carusi*, 112 U. S. 478, 484, 5 Sup. Ct. 281, 28 L. Ed. 820. The truth is that there was no error and no omission in the charge of the court. The rule that the company was liable if the conductor ought to have known that the plaintiff was alighting was inapplicable to this case, because the uncontradicted evidence was that he did know, and the court properly limited its instruction to the jury upon this subject to the rule applicable to the case before it. The charge was an admirable one. It was brief, clear, and pointed. It presented to the jury the crucial question which they were to decide, and applied the rules of law which governed the case as it existed to the very issue before the jury, so that their duty was not only made clear, but its discharge was made easy. Such a charge is far more helpful to a jury and much more conducive to a just and speedy administration of the law than abstract proposi-

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tions of law or dissertations on theories which may be sound, but respecting the application of which to the issues of the case the jury are left in doubt. The judgment below cannot be reversed on account of the alleged errors in the charge.

There are two specifications leveled at rulings of the court upon the introduction and rejection of evidence. One is that the court admitted a rule of the company which required his servants to stop its cars on the farther cross-walk of street crossings, and the other is that it rejected two rules of the company offered by the plaintiff to the effect that when a car has stopped the conductor shall give the signal for it to start, and that no car shall be started when a passenger is attempting to board or to alight from it. The plaintiff charged the defendant and its servants with negligence in that they stopped a car on the near cross-walk on a street crossing, and then started it again, while the plaintiff was attempting to alight from it. The defendant denied this charge, and averred that it had made a rule that its employees should not stop any car at the near crossing, and that they had obeyed this rule. The adoption and enforcement of such a rule was certainly some evidence of reasonable care in the operation of all its cars across the streets of the city of Omaha, including the car upon which the plaintiff was riding. In view of this fact, the admission of the rule in evidence cannot be said to be error.

For a like reason the rules offered by the plaintiff should have been received. If the testimony of the plaintiff's witnesses was true that the conductor and motorman of the car upon which she was riding violated the rules which she offered in evidence when they started the car after it was stopped without signal and while she was alighting, the existence of the rules which were thus violated certainly had a natural tendency to prove that they were not exercising reasonable care.

This error was, however, robbed of all its potency by the subsequent charge of the court. At the close of the evidence the court instructed the jury that if this car stopped, and if the conductor knew that the plaintiff was alighting when the car started, the company was liable for all the plaintiff's injuries as a matter of law. The jury could not have given the rules of the company and the alleged acts of the employees in violation of them any greater effect than to have charged the defendant with liability for the plaintiff's injuries on account of them, and the court gave those acts, without the rules, that effect as a matter of law. The rejection of the rules, therefore, was not prejudicial, and could not have been prejudicial to the plaintiff's case, and error without prejudice is no ground for reversal.

There was no reversible error in the trial of this case, and the judgment below is affirmed.

WOOD *v.* MAINE CENT. R. CO.*(Supreme Judicial Court of Maine, Oct. 22, 1903.)*

[56 Atl. Rep. 457.]

Carriers of Passengers—Baggage—Liability.*

The relation of passenger and public carrier between the parties entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. No separate contract is required for the carriage of mere personal baggage, which is accompanied by the passenger in its transportation. With respect to such baggage, the carrier of passengers incurs the responsibility of common carriers of merchandise, and becomes liable as an insurer of the baggage, except in cases of vis major or the public enemy.

Same—Same—Same—Effect of Owner Not Accompanying Baggage.

But in the absence of any special agreement therefor the carrier does not incur this liability as an insurer of the baggage, unless the passenger accompanies it in its transportation, or is prevented from so doing by the fault of the carrier. If, therefore, that which would have been properly baggage, had it been accompanied by the owner as a passenger, should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in the character of baggage, and would not be responsible for it as such.

Same—Same—Same—Same.

Although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. Where the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and, when his journey has been safely made, the carrier may at once deliver to him his baggage.

*See generally, *Henry Sonneborn & Co. v. Southern Ry. Co.* (S. Car.), 8 R. R. R., 318, 31 Am. & Eng. R. Cas., N. S., 318 (act of God no defense where negligence in exposing baggage to rain; and duty to protect from weather); *Thomas v. Southern Ry. Co.* (N. Car.), 6 R. R. R. 860, 29 Am. & Eng. R. Cas., N. S., 860 (presumption of negligence from injury to baggage); notes, 5 Am. & Eng. R. Cas., N. S., 79 (act of God); monograph, 2 Am. & Eng. R. Cas., N. S., 1 et seq.; note, 14 Am. & Eng. R. Cas., N. S., 424 (baggage delivered to baggage master); note, 19 Am. & Eng. R. Cas., N. S., 295 (right of passenger to carry parcels); note, 21 Am. & Eng. R. Cas., N. S., 376 (where unreasonable delay in removing); *Wald v. Pittsburg, etc., R. Co.* (Ill.), 5 Am. & Eng. R. Cas., N. S., 70, 79 (act of God, liability for previous negligence); *Pennsylvania Co. v. Liveright* (Ind. App.), 3 Am. & Eng. R. Cas., N. S., 427 (presumption of negligence from failure to deliver); *State v. Knight* (N. J.), 3 Am. & Eng. R. Cas., N. S., 374 (how liability arises); *Ringwalt v. Wabash R. Co.* (Neb.), 2 Am. & Eng. R. Cas., N. S., 450; *Southern Kansas Ry. Co. v. Clark* (Kan.), 2 Am. & Eng. R. Cas., N. S., 460 (larceny); *Blackmore v. Mo. Pac. Ry. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 360; *Kansas City, etc., R. Co. v. McGahey* (Ark.), 7 Am. & Eng. R. Cas., N. S., 767 (liability as warehouseman); *Bader v. Southern Pac. Co.* (La.), 17 Am. & Eng. R. Cas., N. S., 60 (stored for transportation); *Whicher v. Boston & A. R. Co.* (Mass.), 18 Am. & Eng. R. Cas., N. S., 325 (lost while in custody of passenger); *Toledo & O. C. R. Co. v. Bowler & Burdick Co.* (Ohio), 19 Am. & Eng. R. Cas., N. S., 574 (liability for merchandise shipped as baggage depends upon existence of gross negligence); *Southern Kansas Ry. Co. v. Clark* (Kan.), 2 Am. & Eng. R. Cas., N. S., 460 (theft from sample case in baggage room); *Dawley v. Wagner Pal., etc., Co.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 766; *Pullman's Palace Car Co. v. Martin* (Ga.), 2 Am. & Eng. R. Cas., N. S., 475 (sleeping car companies).

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Same—Same—Same—Same.

Where the owner did not intend to accompany his baggage the entire distance of his route, and it is admitted that he did not in fact accompany it over any part of the defendant's railroad, *held*, that the defendant did not incur the full responsibility of a common carrier of goods, and that at the time the trunk was rifled of its contents the defendant was only liable as a gratuitous bailee.

Same—Same—Negligence—Insufficiency of Evidence.

Held, that there was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

Same—Same—Same—Theft from Baggage Room.

The trunk was deposited in an ordinarily well-constructed baggage room, with the doors and windows secured in the ordinary manner, on the night in question, and the felonious entrance was effected by breaking out a pane of glass in one of its windows. The plaintiff's conduct indicated that he regarded this baggage room as a reasonably safe place for the storage of baggage. He must have been familiar with the condition of the baggage room of the defendant company at that station. When he stopped in Boston, he knew that in the ordinary course of transportation his trunk would reach its destination at Wiscasset, in this state, in advance of his arrival, and be stored in this baggage room over night. After his arrival he made no haste to call for it, and showed no anxiety in regard to its safety.

(Official.)

Report from Supreme Judicial Court, Cumberland County.

Action by Edward H. Wood against the Maine Central Railroad Company to recover for loss of plaintiff's baggage by theft. Case reported, and judgment for defendant.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, POWERS, and SPEAR, JJ.

W. M. Hilton, for plaintiff.

N. & H. B. Cleaves, S. C. Perry, and H. W. Swasey, for defendant.

WHITEHOUSE, J. In this case the first count in the writ sets out an express contract on the part of the defendant, as a common carrier, to transport the plaintiff's trunk, with its contents, safely from Portland to Wiscasset, and there to deliver it to the plaintiff. The second is on an alleged contract by the defendant, as a warehouseman, to receive from the plaintiff, and safely keep, and deliver to him his trunk and its contents upon demand. The defendant pleads to the first count that it was not liable to plaintiff as a common carrier for the loss of his property, and to the second count that, as a warehouseman, it used reasonable and ordinary care and diligence in keeping the property, and that the defendant's baggage room in Wiscasset was broken open and entered by thieves, and the contents of the trunk stolen, without the fault of the defendant.

On the 16th of June, 1902, the plaintiff bought a passenger ticket from Asbury Park, N. J., to Boston, and had his trunk checked through to Wiscasset, Me. The plaintiff testified that he paid "an additional price" or "extra charge" over and above the price of his ticket to have the trunk checked

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through to Wiscasset, but he was unable to remember whether this "extra charge" was 75 cents or \$1.25. The check found on the plaintiff's trunk was the ordinary paper check usually attached to trunks of passengers on the roads over which this trunk was carried. The plaintiff came to Boston as a passenger on the same train with the trunk, arriving there on the morning of June 17th. He remained in Boston the entire day, and in the evening continued his journey by boat from Boston to Bath. There, on the morning of June 18th, he bought a ticket, on which he traveled over the defendant's railroad from Bath to Wiscasset, arriving there about 9:30 in the forenoon of that day. In due course of transportation upon the check, the plaintiff's trunk had reached Wiscasset over the defendant's railroad from Portland at 2:55 in the afternoon of the day preceding, but, no one appearing there to receive it on its arrival, it was duly deposited in the baggage room with other baggage. The plaintiff did not call for it until the afternoon of the 18th, about 24 hours after its arrival.

It is contended that the facts thus disclosed are insufficient to establish the liability of the defendant as a common carrier and an insurer of the trunk, and that it can only be liable either as a gratuitous bailee or as a warehouseman.

It is settled and familiar law respecting public carriers of passengers that the existence of the relation of passenger and carrier between the parties entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. No separate contract is required for the carriage of mere personal baggage which is accompanied by the passenger in its transportation. The fare for the transportation of the passenger includes compensation for the carriage of the baggage, and with respect to such baggage the carrier of passengers incurs the responsibility of common carriers of merchandise, and becomes liable as an insurer of the baggage, except in cases of vis major or the public enemy. But in the absence of any special agreement therefor the carrier does not incur this liability as an insurer of the baggage, unless the passenger accompanies it in its transportation, or is prevented from so doing by the fault of the carrier. *Wilson v. Grand Trunk Railway*, 56 Me. 60, 96 Am. Dec. 435; *Id.*, 57 Me. 138, 2 Am. Rep. 26; *Graffam v. Boston & Maine Railroad*, 67 Me. 234. "If, therefore, that which would have been properly baggage, had it been accompanied by the owner as a passenger, should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in the character of baggage, and would not be responsible for it as such. * * * For, although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in

the two cases is not always the same. Where the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and, where his journey has been safely made, the carrier may at once deliver to him his baggage." Hutchinson on Car. §§ 701, 702; Collins v. Boston & Maine Railroad, 10 Cush. 506.

In Beers v. Boston & Albany R. Co., 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535, the defendant company received from another carrier and transported the plaintiff's trunks upon the erroneous assumption created by the checks on the trunks that they were the personal baggage of passengers who had purchased tickets over the defendant's road as a connecting carrier. In fact, the owner of the trunks traveled by another route, but supposed that the trunks were properly checked. The court held that the defendant did not receive the trunks in the capacity of a common carrier of passengers for hire, and, as there were no passengers accompanying the trunks, or who had bought tickets entitling them to passage with their trunks over defendant's road, there was no liability of the defendant, except for willful and intentional injury to the trunks in its possession. So, in the recent case of Marshall v. Pontiac, Oxford & Northern R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650, the plaintiff purchased a passenger ticket over the defendant's railroad for the purpose of obtaining a check upon which his trunk was forwarded as baggage, without any intention of accompanying the baggage in its transportation. He made the journey to his destination by his own private conveyance, but in the meantime the baggage had arrived, and, as the owner was not there to receive it, the trunk was deposited in the baggage room used for that purpose. The second night after the arrival of the trunk, the baggage room was feloniously entered, and the trunk carried away by thieves. Some four months later the plaintiff used his ticket as a passenger on the defendant's railroad. The court held that the plaintiff was not a passenger at the time the trunk was transported over the road, and that at the time it was stolen from the baggage room the defendant was only a gratuitous bailee, and, not being guilty of "gross negligence," it was not liable to the plaintiff. In this case, however, the court deemed it proper to close the opinion with this observation: "We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but, without fault upon his part, did not accompany it, but went upon a following train, a different case is presented."

In the case at bar it satisfactorily appears from all the evi-

dence that the plaintiff's trunk was received by the carrier in New Jersey in the ordinary way as the personal baggage of a passenger, in the expectation that it would be accompanied by the owner. It is true that the plaintiff testifies that he paid an "extra amount" to have the trunk "checked through to Wiscasset," but he is unable to state the precise amount paid for that purpose, and he recalls no conversation between the checker and himself tending to show that the trunk was to be forwarded as freight without the passenger. He received only the ordinary passenger check for the trunk, and it seems probable from all the evidence that the "additional price" paid by him was only the ordinary charge for the transfer of the baggage of passengers across New York and Boston. The conclusion is irresistible that when the trunk was checked at Asbury Park both the parties understood that it was to go forward as the baggage of a passenger. It is equally clear that the plaintiff did not intend to accompany it beyond Boston, and it is admitted that he did not, in fact, accompany it over any part of the defendant's railroad.

It is accordingly the opinion of the court that the defendant did not incur the full responsibility of a common carrier of goods, and that at the time the trunk was rifled of its contents the defendant was only liable as a gratuitous bailee.

But with respect to its manner of storing and keeping the trunk, the evidence fails to show that the defendant was guilty of any negligence which would render it liable, as a gratuitous bailee, to compensate the plaintiff for the loss of baggage taken from its custody by shopbreakers and thieves. The trunk was deposited in an ordinarily well-constructed baggage room, with the doors and windows secured in the ordinary manner, on the night in question, and the felonious entrance was effected by breaking out a pane of glass in one of its windows. The plaintiff's conduct indicated that he regarded this baggage room as a reasonably safe place for the storage of baggage. Wiscasset was his old home. He must have been familiar with the condition of the baggage room of the defendant company at that station. When he stopped in Boston, he knew that in the ordinary course of transportation his trunk would reach its destination in advance of his arrival, and he stored in this baggage room over night. After his arrival he made no haste to call for it, and showed no anxiety in regard to its safety.

There was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

Judgment for the defendant.

ROBINSON v. CHICAGO & A. R. Co. et al.*(Supreme Court of Michigan, Dec. 22, 1903.)*

[97 N. W. Rep. 689.]

Death of Passenger—Cause of Death—Evidence.

Where a passenger on a train which was lurching considerably was last seen alive going out of one sleeping car for the next one, which he did not enter, and was afterwards found dead beside the track, the manner of his death is not mere conjecture, but it is a fair inference that he was thrown by the lurching of the train through the open vestibule door, there being nothing to indicate he intended to commit suicide.

Same—Action against Carrier and Sleeping Car Company—Right to Complain of Direction of Verdict for Car Company.

A railroad company sued jointly with the Pullman Car Company for death of a passenger who was thrown through an open vestibule door between Pullman cars cannot complain of the directing of a verdict for the car company; it not being concerned with whether the car company was also liable to plaintiff, and the verdict and judgment not being conclusive as to the car company's liability to the railroad company under the contract between them for the furnishing of the cars.

Same—Defective Vestibule Door—Liability—Contract between Companies.

A railroad company having placed its dining car at the rear of the train, and invited its passengers to go to and from it, is bound to provide them a safe passage from one car to another, and cannot escape liability for its failure to do so by showing a contract with the Pullman Car Company to do it.

Same—Same—Negligence.

Where an inspection before a train was made up would have shown defects in the vestibule door between Pullman cars, their presence, by which a passenger was killed, was negligence.

Same—Same—Same.*

The fact that the vestibule door between Pullman cars on a fast moving train was open owing to a defect, when it was intended to be closed, whereby a passenger was thrown through it, was negligence.

Error to Circuit Court, Kent County; Alfred Wolcott, Judge.

Action by Samuel Robinson, Jr., administrator of Samuel Robinson, deceased, against the Chicago & Alton Railroad Company and the Pullman Car Company. Judgment for plaintiff against the railroad company, which brings error. Affirmed.

Plaintiff recovered verdict and judgment for damages occasioned by the death of Samuel Robinson, Sr., while a passenger upon a train of the defendant railroad company—through the alleged negligence of said company. The deceased left his home in Charlotte, Mich., July 2d, to attend the Democratic National Convention at Kansas City, Mo. The delegation to the convention from Michigan met in Chicago, having arranged with the defendant railroad company for a special train of sleeping cars to take them from Chicago to Kansas City on the night of July 2d. The train

*See generally, monograph, 3 R. R. R. 154, 26 Am. & Eng. R. Cas. N. S., 154.

was made up of the engine, baggage car, five sleepers, and a dining car in the rear. The cars for convenience are numbered from the front of the train 1, 2, 3, 4, and 5. The sleepers were owned by the defendant Pullman Company, the dining car by the defendant railroad company. Mr. Robinson had a railroad ticket, and also a berth ticket in Pullman car No. 3. The train left Chicago at 11 o'clock, an hour late. After getting out of the city, it ran at a high rate of speed. Mr. Robinson and some others went to the dining car for refreshments about midnight, where they remained until after the train left Joliet. They then left the dining car for their respective sleepers, and Mr. Robinson and some others stopped for a short time near the forward end of car No. 4, to converse with friends. One of them passed through the vestibule into car No. 3, followed by Mr. Robinson. Another soon afterwards passed from No. 4 into No. 3, and inquired for Mr. Robinson, desiring to speak with him. He could not be found. The last time he was seen alive was when he passed out of the front door of car No. 4 to cross the vestibule into car No. 3. In doing so he fell from the car and was killed. His dead body was found the next morning lying on the east side of the track near a station named Mazona, lying between the side track and the main track, near a switch which the train had just passed over. The body, after striking the ground, rolled about 30 feet. An investigation showed that the fastenings of the vestibule door, through which Mr. Robinson fell, were defective. The evidence on the part of the plaintiff showed that the slot which held the bar designed to keep the door closed was old and worn, and would not hold the bar in place, and that the spring and latches, also designed to keep the door closed, were broken and defective. There was evidence that the train swayed considerably in its movements, so that the passengers had to be careful to prevent being thrown down in passing through the cars, or from one car to another. The theory of the plaintiff is that Mr. Robinson was thrown through the open door of this vestibule. The Pullman Car Company was made a party as a joint tortfeasor. At the close of the evidence the court directed a verdict for the Pullman Company, and left the question of negligence of the defendant railroad company to the jury. The following special questions were submitted to the jury, and all answered in the affirmative: "(1) Were the vestibule sleeping cars on the train owned by the Pullman Company at that time? A. Yes. (2) Were the latches and socket for the bar on one of the vestibule doors in the vestibule dining car between No. 3 and No. 4 so broken and worn that the door would not and did not remain closed while the train was running? A. Yes. (3) If so, did Samuel Robinson, the deceased, leave the train through that door by falling or by being thrown through that door while the train was in motion, from the vestibule car? A. Yes." Two other special questions were

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requested by the defendant railroad company, which the court refused to submit: "(4) Did the conductors and porters, employees of the Pullman Company, use proper care to keep the doors of the vestibules, and particularly the door of the vestibule between cars Nos. 3 and 4, closed while the train was running? (5) Was the injury caused by the negligence of the Pullman Company and its employees in not having the fastenings on the door of the vestibule between cars Nos. 3 and 4 in proper repair, and in not keeping that door closed while the train was running?"

T. J. O'Brien and James H. Campbell, for appellant.

McKnight & McAllister, for appellee Robinson.

Burlingame, Belden & Orton, for appellee Pullman Car Co.

GRANT, J. (after stating the facts). 1. It is urged that the manner in which Mr. Robinson met his death is mere conjecture, and that, therefore, there can be no recovery. This position is untenable. It is a fair inference from the evidence adduced in behalf of the plaintiff that Mr. Robinson was thrown through the vestibule door. He was seen to go out of car No. 4 for car No. 3, which he did not enter. The natural conclusion is that he either voluntarily jumped from the car through this door, or was thrown through it by the lurching of the train. There is nothing to indicate that he intended to commit suicide by jumping from the car.

2. It is next urged that the court erred in directing a verdict for the Pullman Car Company. This is not a question in which the defendant railroad company is interested. The verdict and judgment are not conclusive of the liability of the Pullman Car Company to the railroad company under the contract between them, by which the Pullman Company furnishes its cars to be run over the defendant's road. Private contracts between these two companies do not affect the rights of travelers. Plaintiff has not appealed from the decision against him and in favor of the Pullman Company. The sole question left for the jury was, is the railroad company liable for the defects in the cars furnished by the Pullman Car Company to be used by the railroad company in transporting its passengers? If the defendant owed no duty to its passengers for defects in the cars of the Pullman Company, then the railroad is not liable, and the verdict should be reversed. If, on the contrary, the railroad company, under its contract of carriage with its passengers, is liable for such defects, and cannot defend on the ground that under a contract with the Pullman Car Company the latter company furnished the cars, then the verdict must be sustained. The question is not whether a judgment could be maintained by the plaintiff against the Pullman Company, but whether it can be sustained against the railroad company. If the court had directed a verdict for the railroad company, and had left the question of the negligence of the Pullman Company in pro-

viding these cars for use of passengers to the jury, the sole question would have been, was the Pullman Company liable to a passenger for these defects in its own cars? Whether the Pullman Car Company is bound under its contract to indemnify the railroad company is not involved in this litigation. In a suit by the former company against the latter involving the liability of the latter to the former for the injury the decision rendered by the court in this case is not *res adjudicata*. Upon that question no such issue is raised by the pleadings. *Warren B. & M. R. Co.*, 163 Mass. 484, 40 N. E. 895; *Buffington v. Cook*, 35 Ala. 312, 73 Am. Dec. 491. Plaintiff might have brought suit against the railroad company alone, or might at any time have discontinued it against the Pullman Car Company. *Moreland v. Durocher*, 121 Mich. 398, 80 N. W. 284; *Burroughs v. Eastman*, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419. It is unnecessary to determine the question of the liability of the Pullman Company to the plaintiff, and we refrain from discussing it. The deceased's contract of carriage was not made with the Pullman Company; it was made with the railroad company. He knew nothing of the contract relations between the two defendants. It is quite likely that he did not know that the cars were owned, controlled, and managed by a separate company. As to the deceased, therefore, the railroad company owed to him the duty to see that the cars which were run over its road were properly equipped, in good condition, and properly managed. It failed in this duty, and cannot evade it by showing that it had a contract with another company to do it. From the description of the defects, they evidently existed when these cars were placed by the defendant upon its tracks for the transportation of the deceased and others. Defendant placed its dining car at the rear of the train, and invited its passengers to go to and from it. It was therefore bound to provide them a safe passage from one car to another. *Penn. R. R. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Dwinelle v. N. Y., C. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611. See, also, *Robinson v. Benev. Soc. (Mich.)* 94 N. W. 211. It follows from what we have said that there was no error in refusing to submit special questions 4 and 5 to the jury.

3. It is, however, urged that, the accident causing this injury occurring in the state of Illinois, this case will be ruled by the *lex loci*. It is urged that the courts of that state have decided that the Pullman Car Company is liable, and cite *Nevin v. Pullman Car Company*, 106 Ill. 222, 46 Am. Rep. 688; *Pullman Company v. Fielding*, 62 Ill. App. 577. In *Nevin v. The Pullman Company* the plaintiff, a passenger, was refused a berth in a sleeping car of the defendant. In *Pullman Company v. Fielding* a passenger occupied an upper berth. Becoming ill in the night, he rang the bell for the

porter, desiring to be assisted in descending from his berth. The porter did not respond. Plaintiff then attempted to get out of the berth alone, and by a lurching of the car was thrown and injured. It will be observed that in neither of these was there any defect in the cars provided or in the management. The railroad company had performed its duty towards the traveler in furnishing safe and suitable cars. The negligent acts complained of were solely those of the Pullman Car Company's employees. Whether the railroad companies would have been liable as well if the parties had seen fit to sue them on the ground that the companies had provided sleeping cars for the use of their passengers was not determined in either of those cases. In *Pullman Company v. Fielding* suit was brought against both the railroad company and the Pullman Company, and a verdict rendered against both. Pending a motion for a new trial, the plaintiff discontinued his suit against the railroad company. Those cases decided simply that under their facts the Pullman Company was liable. They do not decide that the railroad company was not liable. Neither do they decide that the railroad company would not be liable to a passenger for defects in cars furnished by the former for the use of the latter in transporting its passengers. This contention, therefore, cannot be sustained.

4. Counsel contend that, if the fastenings of the door were defective, that was not of itself negligence, and that negligence in these defects would consist of failure to repair within a reasonable time after the defects became known, or ought to have been known. We think there is nothing in this record to show the application to this case of the rule here invoked. It is evident that an inspection before the train was made up would at once have revealed the defective condition of the vestibule door. It was the duty of the defendant to inspect its cars before the train was made up, and to see that they were in proper condition, so far as a reasonable inspection would demonstrate that condition. This is not a case of defective highways, where sufficient time must elapse between notice of the defective condition and the accident to permit proper repairs.

5. Error is assigned upon the refusal of the court to instruct the jury, as requested, that the fact that the vestibule door was open was not of itself negligence. Counsel cite in support of this proposition, *Ward v. C. & N. W. R. Co.*, 165 Ill. 462, 46 N. E. 365. It will appear from an examination of that case that the failure to keep the doors closed was not one of the grounds of negligence. The negligence charged was that the railroad company, instead of stopping at the station which had been announced, stopped 300 feet before reaching it, whereupon the plaintiff, assuming that he was at the station, proceeded to get off. The court said that:

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"The statements as to obstructions, want of light, improper condition of the vestibule doors, etc., are merely matters explanatory of the manner in which the defendant was thrown to the ground, and are only material provided it is sufficiently shown that he was justified in attempting to alight from the car at that place; that is to say, it was not, as a matter of law, the duty of the defendant to keep the doors of the vestibule closed, the vestibule lighted, the ground near the track at that particular place free from gravel and kept lighted, etc., as an independent proposition." In the present case the train was running at a high rate of speed. It was evidently intended that these doors should be closed. It was owing to a defect that the one in question was not closed. Under these circumstances the defendant will not be permitted to say that it was not negligence to have the door open, when in fact it was intended to be closed; and passengers had a right to assume that it was. The conductor of the train testified: "In my walks through the train I should see that these vestibule doors were closed. We have instructions to do that from the trainmaster and superintendent. These instructions are in writing."

Judgment affirmed.

HOOKER, C. J., did not sit. The other Justices concurred.

LEWIS v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey, Nov. 9, 1903.)

[56 Atl. Rep. 128.]

Carriers of Live Stock—Liability.*

A carrier of live stock is not liable for injuries caused by the natural propensities of the animals.

Same—Cause of Injuries—Evidence.

Where the injuries are such that they are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the court cannot assume, in the absence of evidence, that the injuries were due to the latter cause.

Same—Negligence—Delay.

A delay of 12 hours in transportation of live stock, caused by the necessity of holding the cattle on account of the sickness and death of one, does not constitute negligence where the remaining cattle are sent forward by the next train.

Same—Care of Stock by Shipper—Validity of Contract.†

A contract between a carrier of live stock and a shipper that the shipper shall take care of, feed, and water the stock, whether delayed in transit or otherwise, is valid.

Same—Failure to Feed and Water.†

For injury to live stock transported under such a contract, arising from failure to feed and water them, the carrier is not liable.

(Syllabus by the Court.)

*See foot-notes appended to *Central of Georgia Ry. Co. v. Glascock & Warfield* (Ga.), 9 R. R. R. 292, 32 Am. & Eng. R. Cas., N. S., 292.

†See monograph appended to *Central of Georgia Ry. Co. v. James* (Ga.), 9 R. R. R. 1, 32 Am. & Eng. R. Cas., N. S., 1.

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Appeal from District Court of Newark.

Action by Gustave Lewis against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued June term, 1903, before GARRISON, GARRETSON, and SWAYZE, JJ.

Verdenburgh, Wall & Van Winkle, for appellant.
Guild, Lum & Tamblyn, for appellee.

SWAYZE, J. The plaintiff, a dealer in live stock, shipped from Prospect, Ohio, to Newark, N. J., a car load of 21 cows and 3 calves, under a written contract made with the Hocking Valley Railway Company. The contract stated that the cattle had been received by the Hocking Valley Railway Company for itself and on behalf of connecting carriers for transportation, upon certain terms and conditions. These terms and conditions, as far as material to the case, were as follows: "That the said shipper is at his own sole risk and expense to load and take care of and to feed and water said stock, whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto except in the actual transportation of the same." The cattle were unloaded, watered, and fed at the East Liberty Stockyards near Pittsburg, Pa., and reloaded, when the plaintiff's agent who accompanied the train from Prospect, Ohio, left the train. The train started east from Pittsburg, September 21, 1902, at 11:21 a. m., and reached Altoona about 6 p. m. At that point it was noticed by the employees of the defendant that one of the cows were down in the car giving birth to a calf. They had the car taken from the train, unloaded, and the cow attended by a veterinary. The car was reloaded at 5:50 the next morning, with the exception of the cow already mentioned, and was attached to a train at 7:55 a. m. The train arrived at Waverly at 9 a. m., September 23d, and the car was ready for the delivery of the cattle between 10 and 11 o'clock. The cattle seemed to be in good condition between Altoona and Newark, but at the time they were delivered to plaintiff one calf was dead, one had a broken leg, and one cow was in such condition that it had to be hauled to the plaintiff's place of business, and there died. Many of the cows were in bad condition, so as not to be salable as milch cows. The cattle had no food or water for nearly 48 hours. There was a train by which these cattle might have been shipped, which left Altoona before the train which actually took the car, but the cow was still ill (it died subsequently), and this train was not a regular cattle train, and was known as a slow freight train. The district court judge gave judgment for the plaintiff.

The case fails to show the cause to which the bad condition

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of the cattle on their arrival in Newark was due. There is nothing in the agreed facts to show whether damages were allowed for the dead calf or the calf with the broken leg; but, as there is an explicit statement that no recovery was allowed for the cow and calf which died at Altoona, the natural inference is that the damages for these two calves, dead and injured at Newark, must have been included in the judgment. If they were not so included, the state of the case would have included them in the exception with the cow and calf which died at Altoona. The injuries to these calves are as likely to have been caused by the peculiar nature and propensities of the animals, as by any other cause, and if so caused the carrier would not be liable. *Evan v. Fitchburg R. R.*, 111 Mass. 142, 15 Am. Rep. 19; *Clarke v. Rochester, etc., R. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *Penn v. Buffalo, etc., R. R. Co.*, 49 N. Y. 204, 10 Am. Rep. 355; *Maynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Coup-land v. Housatonic R. R.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534. In the absence of proof as to the cause of death or of the broken leg, we cannot assume that these injuries were due to the fault of the carrier, rather than to the natural propensities of the animals. *Pennsylvania R. R. v. Rairodon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239. If the judgment included damages for the two calves, error was committed, unless there was proof that the injuries were due to the carrier's negligence, which does not appear in the state of the case.

We may, however, assume, in favor of the judgment below, that, as stated in counsel's brief, the judgment did not include an allowance of damages for these calves, and included only damages to the cattle arising out of the delay at Altoona, or out of the failure to feed and water. The state of the case does not show that the district court found it was negligent to hold the car 12 hours at Altoona. The car was held because one of the cows was giving birth to a calf and required attention. Delay, under such circumstances, seems to us an act of prudence, not of negligence. The case does not show any reason for holding that it was negligent not to forward the car by the slow freight train. It does not appear that the slow freight reached Newark in advance of the train which brought the car. If that was the fact, still the company was not negligent in holding the car, for the sick cow was still living. In considering delay in forwarding live stock, we must remember that a delay of at least five consecutive hours was imposed upon the carrier by act of Congress. Rev. St. § 4386 [U. S. Comp. St. 1901, p. 2995]. The interstate carrier is forbidden under a penalty to confine the cattle for a longer period than 28 consecutive hours without unloading for rest, water, and feeding. The time of transit between Pittsburg and Newark appears from the facts agreed

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upon to have been more than 28 hours. The carrier was therefore required by law to delay at least 5 hours. No other train by which the cattle could be forwarded, except the slow freight, seems to have left Altoona during the delay and before the train which took the cattle. Negligence cannot be inferred from the delay under the circumstances of this case.

Assuming—what the state of the case fails to show—that the bad condition of the cattle was due to the failure to feed and water, the question remains: Is the defendant liable notwithstanding the special contract, which required the shipper to load, take care of, feed, and water the stock, whether delayed in transit or otherwise? The position of a carrier of live stock is so different from the position of a common carrier of goods not endowed with life that many judges have held that carriers of live stock are not subject to the liability of common carriers. Cases are collected in 5 American and English Encyclopedia, 478. It is suggested in Judge McClain's article in 6 Cyclopedia of Law and Procedure, 371, that this view was adopted in analogy to that under which a carrier of slaves was held not to be liable as a common carrier of goods. *Boyce v. Anderson*, 2 Pet. 150, 7 L. Ed. 379. As was said by Justice Field in *North Pennsylvania R. R. Co. v. Commercial National Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287: "A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods." It has accordingly been held by an unbroken line of decisions that contracts limiting the liability of carriers of live stock and casting upon the shipper the obligation to feed and water en route are valid. *South, etc., Alabama R. R. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Georgia R. R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Central R. R. Co. v. Bryant*, 73 Ga. 722; *Cooper v. Raleigh, etc., R. R. Co.*, 110 Ga. 659, 36 S. E. 240; *St. Louis R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Betts v. Farmers' L. & T. Co.*, 21 Wis. 80, 91 Am. Dec. 460; *Morrison v. Phillips, etc., Construction Co.*, 44 Wis. 405, 28 Am. Rep. 599. And this even in states where there is a statute forbidding a carrier to relieve himself by contract from his common law liability. *Grieve v. Illinois Central R. R. Co.*, 104 Iowa, 659, 74 N. W. 192; *Burgher v. Chicago, etc., R. Co.*, 105 Iowa, 335, 75 N. W. 192. The duty to feed and water his own cattle is naturally the duty of the shipper, and the federal statute already referred to treats it as such, and devolves it primarily upon him. Where such a contract is made, the carrier cannot be held for its failure to feed and water the cattle.

Georgia R. R. Co. v. Reid, 91 Ga. 377, 17 S. E. 934; *Terre*

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Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Faust v. Chicago, etc., R. R. Co.*, 104 Iowa, 241, 73 N. W. 623, 65 Am. St. Rep. 454; *Union Pacific R. Co. v. Langan*, 52 Neb. 105, 71 N. W. 979; *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525. The plaintiff cannot recover where there is such a contract for a failure to feed and water for the reason that the carrier owes him no duty to feed and water. The duty is by contract cast upon the shipper. To hold otherwise would make it possible for the shipper to recover damages caused by his own breach of contract, and those damages would then be recoverable in turn by the carrier in a suit upon the contract. This case differs from *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87. The special contract in that case seems not to have contained the provision requiring the shipper to feed and water the horses, and the contract was held invalid because it sought to exempt the carrier from liability for its own negligence. In that case, moreover, the shipper had made arrangements to water and feed the horses, and the carrier's agent did not comply with his request to unload the horses for that purpose. It has been held that, if the carrier knows that no one is accompanying the animals to care for them, that duty devolves upon the carrier. *Louisville, etc., R. Co. v. Spalding*, 8 Ky. Law Rep. 355; *Chicago, etc., R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289. This view does not commend itself to us. The shipper, under that view of the law, secures a right of action against the carrier for damages caused by his own breach of contract. In our judgment, the rights and obligations of the parties must be determined by the contract they have made.

It is argued by the plaintiff that the agreement of the shipper to feed and water the cattle is without consideration. It is, however, one of the terms of the contract which the parties had the right to make, and is made upon the same considerations as any other term of the contract.

The judgment should be reversed, with costs, and there should be a judgment of nonsuit.

LAKE ERIE & W. R. CO. *et al.* v. HOLLAND.

(*Supreme Court of Indiana, Nov. 24, 1903.*)

[69 N. E. Rep. 138.]

Carriers—Breach of Contract—Pleading and Proof—Common Law—Special Contract.

Under the rule that, if a plaintiff recover, he must do so upon and in accordance with the allegations of his complaint, a suit against a common carrier for a breach of its common-law duty in the transportation of live stock must fail upon proof that the shipment was made under a special contract.

Lake Erie & W. R. Co. *v.* Holland**Same—Limiting Liability—Consideration.***

While a public carrier may, to some extent, limit by stipulation in the bill of lading his strict common-law liability, a contract qualifying such liability must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage.

Same—Same—Same—Reduced Rate.*

An actual reduction in the usual freight rate is a sufficient consideration for a contract qualifying a public carrier's common-law liability.

Same—Same—Same—Same—Bill of Lading—Conclusiveness.

A mere recital or acknowledgment in a bill of lading that a reduction in the usual freight rate has been made and accepted in consideration of a qualification of the carrier's common-law liability is not conclusive, but the real transaction may be shown by parol.

Same—Same—Defective Car—Effect of Defendant's Knowledge.

A special contract by a railroad with a shipper of stock provided that the latter was to select his car, and to release the railroad from all liability for damages resulting from a defective condition of the car: *held* that, even though the contract were valid, if the road knew at the time that the car selected was unsafe, and the shipper failed to discover such unsoundness by reason of the defects being hidden, proof of these facts would charge the road with damages accruing therefrom.

Same—Same—Public Carrier.

Freeing itself by contract from its usual common-law duties does not change the true character of a carrier's employment, and it is a public carrier still.

Same—Same—Defective Car.†

The duty to furnish a proper car rests on the carrier, not on the shipper; and the failure to discharge such duty is negligence, from the consequence of which the carrier is not permitted to free itself by contract or otherwise.

Same—Same—Defendant's Knowledge—Failure to Send Person in Charge.

Where a railroad's special contract provided that a shipper was to inspect and select his own car, to send an attendant with the stock shipped, and to release the road from all liability for damages to the stock, including those resulting from a defective condition of the car, and the stock was injured by reason of defects in the car known to the road, but not to the shipper, the latter's failure to send an attendant did not relieve the road from liability.

Complaint.

A complaint good at common law or under the Code must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, on an answer of general denial, to show that he is entitled to judgment.

*As to the necessity of a consideration for stipulation limiting carrier's liability, see notes, 13 Am. & Eng. R. Cas., N. S., 168; 20 Am. & Eng. R. Cas., N. S., 681 (reduced rate as consideration); *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. R. Cas., N. S., 668; *Mannheim Ins. Co. v. Erie & W. Transp. Co.* (Minn.), 13 Am. & Eng. R. Cas., N. S., 161; *Richardson v. Chicago & A. R. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., 170; *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782; *Illinois Cent. R. Co. v. Lancashire Ins. Co.* (Miss.), 21 Am. & Eng. R. Cas., N. S., 840; *Mouton v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673; *Gardner v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 83; *Kellerman v. Kansas City, St. J. & C. B. Railroad Co.* (Mo.), 3 Am. & Eng. R. Cas., N. S., 290; *Louisville & N. R. Co. v. Bell* (Ky.), 8 Am. & Eng. R. Cas., N. S., 413 (free carriage of stockman).

†As to whether a carrier can limit its liability for negligence, see foot-note appended to *Morse v. Canadian Pac. Ry. Co.* (Me.), 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296, where all the preceding authorities in this series are collected.

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Same.

The mere fact that a complaint otherwise good sets out the defense does not make the pleading bad, if it goes far enough to exhibit sufficient matter in avoidance.

Same—Injury to Stock in Transit—Limiting Liability—Defective Car—Defendant's Knowledge.

Where the first paragraph of a complaint against a railroad for damages to plaintiff's live stock in shipment, resulting from defendant's negligence in furnishing an unfit car, counted on its common-law liability; the second paragraph alleging that plaintiff was compelled to assent to a special contract of carriage, requiring him to select and inspect his own car, and releasing defendant from all liability, as a condition precedent to the shipment of the stock; there being no choice of rates, or reduction in the usual freight charges, or other consideration for such release, by reason of which the contract was void; and the third paragraph alleging that the car selected by plaintiff appeared to be safe, but in fact was unsound, which defendant knew—the facts alleged constituted a good cause of action.

Pleading.

As independent pleadings, the latter paragraphs were not invalid because the same things were alleged in the first paragraph.

Instructions—Appeal—Review.

Where the action of the court in the giving of certain instructions of its own motion, and in refusing to give certain instructions requested, was assailed, but what went with instructions requested by the respective parties, and given by the court of its own motion, was left to conjecture, it not appearing that they were filed or brought into the record by order of court or any other method recognized by law, a spreading of them on the court's minutes, and a copying of them into the transcript by the clerk of his own motion, gave the Supreme Court no authority to review them.

Same—Same—Same.

The record must affirmatively show that it embraces all the instructions given; otherwise it will be presumed that the substance of instructions asked and refused was embraced in charges given by the court, and not contained in the record, and that objectionable instructions given by the court of its own motion, and set out on the record, were corrected or withdrawn in others given, and not embraced in the record.

Appeal from Superior Court, Marion County; J. H. Leathers, Judge.

Action by Frank H. Holland against the Lake Erie & Western Railroad Company and others. Judgment for plaintiff, and defendants appeal. Transferred from the Appellate Court under section 13370, Burns' Rev. St. 1901. Affirmed.

John B. Cockrum and Miller, Elam & Fesler, for appellants.

Barrett, Brown, Bamberger & Feibleman, for appellee.

HADLEY, J. Appellee, at Kokomo, Ind., delivered to the Lake Erie & Western Railroad Company, and associate public carriers, 20 horses, to be transported to the Union Stock Yards, in the city of Indianapolis. A written and printed bill of lading was executed by the parties, and the stipulated freight paid by appellee. The animals were unaccompanied by an attendant, and on the journey a hole 8 by 14 inches was broken in the bottom of the car, through which 10 of the horses dropped some of their feet, and were injured, for which

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damage is claimed by appellee. The complaint is in three paragraphs. The first counts upon the common-law liability of appellant as an insurer of the safe delivery of the property at the point of destination. To the first paragraph of the complaint, appellants filed a general denial. The second, in substance, charges the public character of appellants, and that at the time of the shipment, and for a long time theretofore, the appellants had one, and only one, rate of freight for the transportation of horses in car-loads lots from Kokomo to Indianapolis, to wit, 11 cents per 100 pounds, and had only one form of contract for the transportation of such animals; that appellee applied to appellants' agent at Kokomo to ship a car load of horses from that place to Indianapolis, and, before appellants would undertake to carry them, they required appellee, as a condition precedent thereto, to enter with them into a contract on their printed form, a copy of which is made a part of the complaint; and so much thereof as is important in this inquiry follows: "Limited Liability Live Stock Contract. * * * This agreement made this 25th day of March, 1899, by and between [appellants and appellee] Witnesseth: That the said shipper has delivered to said carrier live stock of the kind and number, and consigned, and destined by said shipper as follows: * * * for transportation from Kokomo to Indianapolis * * * subject to the official tariffs * * * and upon the following terms and conditions which are admitted, and accepted, by said shipper as just and reasonable, viz.: that said shipper is to pay freight thereon to said carrier at the rate of 11 cents per 100 pounds from Kokomo to Indianapolis which is the lower published tariff rate based upon the express condition that * * * said shipper is, at his own sole risk and expense, to load and take care of, and to feed and water said stock while being transported * * * and to unload the same, and neither said carrier, nor any connecting carrier, is to be under any liability, or duty with reference thereto, except in the actual transportation of the same; that said shipper is to inspect the body of the car in which said stock is to be transported, and satisfy himself that it is sufficient and safe, and in proper order and condition, and said carrier shall not be liable on account of any loss of, or injury to, said stock, happening by reason of any alleged insufficiency in, or defective condition of the body of said car, * * * and F. H. Holland [appellee] hereby acknowledges that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariff, classifications, and rules of said carrier, and thereby receiving the security of the liability of said carrier, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above mentioned." Appellee was to send an attendant with the horses, to feed, water, and care for them while in transit. The complaint avers that appellee, being thus obliged to ex-

ecute said contract to secure the transportation of his horses, signed it, and paid the stipulated freight, and appellants thereupon took sole possession of the animals, and undertook to transport them to Indianapolis; that although it was stated in said contract that the plaintiff had the option of choosing between two rates of freight—the higher furnishing a higher degree of security, and the lower a less degree—and that he voluntarily elected the lower rate, the fact is that no such option was offered him, nor did he have any knowledge that he could exercise such option, nor did appellants have a schedule rate of freight for such purposes, and each and every one of the exemptions from liability of appellants were exacted by them as a condition to said shipment, and inserted in said contract without any consideration; that, in pursuance of the contract, appellee loaded his horses into a car designated by appellants; that, because of the short distance, and the time necessary, to wit, 3 hours, to transport the said horses to their destination, they needed no food, water, or care en route; that while in transit a part of the floor of the car, by reason of latent defects in its construction, and by reason of being decayed and unsound, which defective and unsound condition was at the time of the shipment known to appellants, broke through, producing a hole 8 by 14 inches in size, by reason of which breaking of the floor 10 of appellee's horses fell with their feet and legs through said hole, and were thereby injured. The third paragraph is like the second, with the additional averments that, when the appellee applied to appellants' agent for a car, he was shown and required to choose between two cars; that one of these was wholly unfit, on account of ice frozen over the floor; that appellee inspected the other, and it appeared to be sound and safe, and he believed it to be sound and fit for the carriage of his horses. It is further charged that appellants knew that the car floor was decayed, weak, and unsound, and on account of which unsoundness the horses were injured. A demurrer to each of the second and third paragraphs was overruled, and the defendants answered by general denial. Trial; verdict and judgment for appellee. The rulings of the court upon the demurrers and in overruling appellants' motion for a new trial are properly questioned.

1. The general assault upon these paragraphs is that, being suits upon a special contract, they each fail to disclose an actionable breach of the contract sued on; the argument being that, as the paragraphs imperfectly count upon the violation of an express contract, there can be no recovery upon a contract implied. We readily acknowledge the rule to be that, if a plaintiff recover, he must do so upon and in accordance with the allegations of his complaint; and, in the application of this rule, a suit against a common carrier for a breach of its common-law duty in the transportation of live stock must fail upon proof that the shipment was made under a special

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contract. *Railway Company v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459. And vice versa, *Fry v. Railway Company*, 103 Ind. 265, 2 N. E. 744. But are these actions upon a special agreement, within the purview of the rule? As we understand the paragraphs—and there is really no difference between them in respect to the general questions—they proceed upon the theory that the plaintiff was compelled by his situation to assent to what purports to be a special contract of carriage under such circumstances and conditions as render the special stipulations void. He alleges that he did not choose between two rates of freight; that he did not know he had a right to so choose; that appellants had no such thing as two rates of freight for the transportation of car loads of horses from Kokomo to Indianapolis, and that he was required by appellants to sign the bill of lading exhibited, exempting them from liability, as a condition precedent to the shipment of the horses; and that he received no consideration for relieving appellants of their common-law duty. It is well settled that a public carrier may, to some extent, limit by stipulation in the bill of lading his strict common-law liability. *Insurance Company v. Lake Erie, etc., Co.*, 152 Ind. 333, 53 N. E. 382. But it is equally well settled that a contract qualifying the responsibility imposed upon the carrier by the common law must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage. *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *German, etc., v. Railway Co.*, 38 Iowa, 127; *Wehmann v. Railway Co.*, 58 Minn. 22, 59 N. W. 546; *Southard v. Railway Co.*, 60 Minn. 382, 62 N. W. 442, 619; *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Potter v. Sharp*, 24 Hun, 179; *Gardner v. Railway Co.*, 127 N. C. 293, 37 S. E. 328; *Schaller v. Railway Co.*, 97 Wis. 31, 71 N. W. 1042; *Railway Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Railway Co. v. Wright* (Tex. Civ. App.) 58 S. W. 846; *Stewart v. Railway Co.*, 21 Ind. App. 218, 225, 52 N. E. 89. A reduction in the usual freight rate is a sufficient consideration, but such concession in charges must be actual, and not fictitious; and a mere recital or acknowledgment in the bill of lading that such abatement has been made and accepted is not conclusive, but the real transaction is always open to explanation and contradiction by parol. *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Railway Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Railway Co. v. Crawford*, 65 Ill. App. 113; *Railway Co. v. Reynolds*, 17 Kan. 251; *Railway Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565. Applying these principles to the averments of the complaint that there was no choice of rates, and no reduction in the usual freight charges, and no consideration for a waiver of appellants' legal liability, it follows,

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if these things are established, there was no valid contract to accept a qualified responsibility from appellants. It is contended on the third paragraph that it is bad because it shows that appellee stipulated to inspect and select his own car, and to send an attendant with the stock, and to release appellants from all liability for damages to the animals, including those resulting from a defective condition of the car, and that, in accordance with the stipulation, he did inspect and select his own car, and that his failure to send a man to care for the stock precludes his recovery for their injury. Again, assuming the special contract as valid (which it was not, as we have seen), appellants extend their argument further than the law will warrant. If, as averred, appellants knew at the time the car selected was unsound and unsafe, and appellee failed to discover such unsoundness by reason of the defects being hidden, and the car appeared to him to be sound and safe, and he believe it to be so, his proof of these facts would charge appellants with the damages accruing therefrom. Freeing themselves by contract from their usual common-law duties did not change the true character of their employment. They were public carriers still. *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Railway Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239. And having accepted appellee's money for the transportation of his horses to Indianapolis, they were bound to furnish a car suitable for the purpose. With the knowledge that the car was unfit and unsafe, they could not rest upon appellee's agreement, induced by safe, but false, appearances, to take the risk. The duty to furnish a proper car rests upon the carrier, and not upon the shipper; and the failure to discharge this duty is negligence, from the consequences of which the carrier is not permitted to free itself by contract or otherwise. *Insurance Co. v. Lake Erie, etc., Co.*, 152 Ind. 333, 53 N. E. 382; *Railway Co. v. Pratt*, 89 U. S. 123, 22 L. Ed. 827; *Railway Co. v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; *Railway Co. v. Harwell*, 91 Ala. 340, 8 South. 649. Furthermore, it is alleged that the floor of the car, by reason of being decayed, weak, and unsound, and known to be so by appellants, broke, and the horses were injured by falling through the hole. If this was the cause of their injury—and it is so admitted by the demurrer—then the animals were not injured for want of feed, water, or care in transit, which appellee agreed to bestow, and appellants would be liable for their negligence in furnishing an unfit car. *Railway Co. v. Sherwood*, 132 Ind. 129, 136, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239.

We now return to appellants' insistence that appellee's right of recovery is confined to the bill of lading under which the horses were shipped, and which they assert is the foundation of the second and third paragraphs of complaint. We

recognize the familiar rule of pleading that a plaintiff should not set forth in his complaint matters that should come more properly from the other side; that a plaintiff should not anticipate the defense, but be content with making his own case, and leave the defendant to choose his own line of defense. Stephen, Pl. 350; Bliss, Code Pl. § 200. It is also elementary that a plaintiff having suffered an actionable injury must aver in his complaint all the facts essential to a disclosure of his right of recovery, or suffer a nonsuit. In brief, it may be affirmed that a complaint good at common law, or under the Code, must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, under an answer of general denial, to show that he is entitled to judgment. And under the operation of this rule, it has been held in some cases, where the relation of the facts seem to require it, that a necessary and incidental disclosure of a defense in stating a cause of action is permissible, and should not be regarded as anticipating a defense, within the rule. *Latta v. Miller*, 109 Ind. 302, 306, 10 N. E. 100; *Hunt v. State*, 93 Ind. 311, 316. But in this case we are not called upon to define the limits of this rule of pleading. For it is undoubtedly true that a complaint which contains facts sufficient to constitute a cause of action is good on demurrer, though it also contains additional immaterial matter. So the mere fact that a complaint otherwise good sets out the defense does not make the pleading bad, if it goes far enough to exhibit sufficient matter in avoidance. *Morgan v. Railway Co.*, 130 Ind. 101, 28 N. E. 548; *Latta v. Miller*, 109 Ind. 302, 306, 10 N. E. 100; *Railroad Co. v. West*, 37 Ind. 211. We conclude, therefore, that the facts set forth in the second and third paragraphs of the complaint, and which are admitted to be true by the demurrers, show that the pretended special contract of shipment was void, and left the transaction standing precisely as if no contract, other than the one implied by law, had been attempted by the parties. So it cannot be accurately said that the paragraphs were founded on a written contract, for no such thing existed in this case. Each of the paragraphs avers the public character of appellants, a delivery to them of the horses for transportation, payment of the freight, negligence in furnishing an unsuitable car, and injury and damages thereby. These facts constitute a good cause of action, and the demurrers were properly overruled. As independent pleadings, the latter paragraphs are not invalid because the same things are alleged in the first paragraph.

2. Appellants assail the action of the court in the giving of certain instructions of its own motion, and in refusing to give certain instructions requested by them. The instructions are not brought into the record by bill of exceptions, but are attempted to be brought in by order of the court; the only ref-

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erence to the subject of instructions being the following recital of the clerk, and noted copy of entry: "Come again the parties, * * * and the plaintiff and defendants each file their request for instructions, and, the argument being heard, the court instructs the jury, which retires to consult of the verdict; * * * and the instructions asked and refused and the exceptions noted thereon, and the instructions given by the court of its own motion, are now filed and made a part of the record herein by order of the court, and are as follows, viz." It will be observed that the clerk informs us that two classes of instructions, namely, those "asked and refused," and those "given by the court of its own motion," were filed and made part of the record by order of court, and which he says "are as follows." Then next appears in the transcript what purport to be three series of instructions—one series requested by the plaintiff, one by the defendants, and one as given by the court of its own motion. Of all those requested by the parties, Nos. 1 and 6 of the series requested by the defendants are the only ones that appear to have been "asked and refused." What went with the instructions requested by the respective parties, and given by the court, is left to conjecture, since it does not appear that they were filed or brought into the record by order of court, or any other method recognized by the law. A spreading of them upon the court's minutes, and a copying of them into the transcript by the clerk of his own motion, amounts to nothing, and gives us no authority to heed them. Here, then, we have a record which affirmatively shows that all of the instructions given by the court are not in the record. We cannot, therefore, consider an objection to the giving or refusing to give any instruction that may be properly in the record. The settled rule of this state goes even further than applies to this record, namely, that the record must affirmatively show that it embraces all the instructions given to the jury; and, upon failure to do so, we must presume that the substance of instructions asked and refused was embraced in charges given by the court, and not contained in the record, and that objectionable instructions given by the court of its own motion, and set out in the record, were corrected or withdrawn in others given and not embraced in the record. *State v. Winstandley*, 151 Ind. 495, 51 N. E. 1054, and cases cited. See, also, *Board v. Gibson*, 158 Ind. 473, 490, 63 N. E. 982.

It is suggested, but not argued, that the court erred in permitting an agent of the consignee of the horses to testify, as a witness for appellee, to what was said over the telephone between him and some one whose voice was not recognized, but who answered a call for appellants at their office in Indianapolis. The substance of the communication is that the witness notified the person who answered for appellants that the car floor had broken and some of appellee's horses

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had been injured, and appellants should give the matter attention, and the response over the wire was that they would send a man over and attend to the matter. We need not decide whether or not the evidence was competent, since it is apparent that appellants could not have been injured by anything said over the telephone.

Judgment affirmed.

JOHNSTON v. CHICAGO, B. & Q. R. Co.

(*Supreme Court of Nebraska, Nov. 18, 1903.*)

[97 N. W. Rep. 479.]

Carriers—Diversion of Shipment—Mortgagee Entitled to Possession—Liability.*

Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to take possession of the mortgaged property wherever found, a common carrier is not liable to the mortgagor for a diversion of a shipment of such property, and a delivery of the same to the mortgagee demanding possession thereof while it is still in the carrier's hands.

Same—Delay in Shipment of Live Stock—Evidence.

In order to recover damages for an alleged delay in the shipment of live stock it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.

Same—Nondelivery—Mortgagee Entitled to Possession—Liability.

Where a mortgagee consigned a shipment of cattle, described in his mortgage, to a commission firm, in order to protect the payment of his mortgage debt, and as soon as payment thereof was made directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for nondelivery to the party designated by such mortgagor.

Pleading—Amendment.

It is not an abuse of discretion for the district court to refuse to permit the plaintiff to file an amended reply where it changes the issues made up in the county court (where the case was originally commenced and tried), and where the right to recover on the new matter contained in such amended reply is barred by the statute of limitations.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Phelps County; Adams, Judge.

Action by Ezekiel Johnston against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See 95 N. W. 614.

James S. Rhea, S. A. Dravo, and John M. Stewart, for plaintiff in error.

W. P. Hall, W. S. Morlan, and J. W. Deweese, for defendant in error.

BARNES, C. This case is before us a second time. On

*See monograph appended to St. Louis, etc., Ry. Co. v. Gans (Ark.), 21 Am. & Eng. R. Cas., N. S., 498; Merz v. Chicago & N. Ry. Co. (Minn.), 2 R. R. R. 931, 25 Am. & Eng. R. Cas., N. S., 931.

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the former trial in the district court the plaintiff recovered a judgment, which was reversed in this court in the case of Chicago, B. & Q. R. Co. v. Johnston, 95 N. W. 614. A second trial in the district court resulted in a verdict and judgment for the defendant, from which the plaintiff prosecuted error.

The facts stated in our former opinion, and detailed therein, are presented in the present record without any essential variance. We therefore, in substance, adopt that statement of the case, as follows: "Ezekiel Johnston brought this action against the Chicago, Burlington & Quincy Railroad Company to recover damages for an alleged breach of contract between said parties, whereby the latter undertook and agreed to ship certain cattle for the former, by rail, from Holdrege to Chicago. The breach assigned by the plaintiff in his petition is that the cattle were diverted from the direct route between said points to South Omaha, where they were detained for some hours, and then forwarded to Chicago, and delivered to another and different party than the one specified in the contract of shipment. The damages claimed are for the diversion above stated, for delay in the shipment, and for the delivery to a person other than the one provided for in the contract. The defendant, by its answer, admits that the cattle were taken to South Omaha, and there detained for some time, but alleges that prior to the shipment of the cattle the plaintiff had executed and delivered certain mortgages thereon to one J. H. Pratt; that by the terms of the mortgages, in case the plaintiff should remove or attempt to remove the cattle from his premises in Phelps county, Neb., or attempt to dispose of them, the mortgagee should have the right to take immediate possession of the cattle by himself or agent, wherever found, and when the cattle should be removed or shipped for sale they should be consigned to the mortgagee at South Omaha, and that they should not be shipped or sold without his order or consent; that such consent was never given, and when the duly authorized agent of the mortgagee learned of said shipment, and while said mortgages were still in force and unsatisfied, he stopped the shipment and took possession of the cattle at South Omaha under and by virtue of said mortgages; that afterwards, in pursuance of an arrangement between the agent of the mortgagee and the plaintiff, the cattle were reshipped from South Omaha to Chicago without unnecessary delay, consigned to an agent of the mortgagee, and upon satisfaction of the mortgages were at once turned over to the person or firm designated by the plaintiff. The reply is a general denial."

The plaintiff now contends that the defendant was not justified in the diversion, the delay, or the nondelivery at destination, and in consequence is liable to him for damages. It appears that in October, 1895, J. H. Pratt shipped the cattle in question from Cadiz, Wyo., billed to himself at Chicago,

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with the privilege of stopping and feeding at some point on the way in order to fatten and prepare them for market. They were stopped at Holdrege, where the plaintiff purchased the cattle, and gave his two notes dated October 29, 1895, secured by mortgages on the cattle, in payment. The notes were made payable at the Union Stockyards National Bank of South Omaha, six months from date, and the mortgages were recorded in Phelps county. They contained the following provision: "It is hereby agreed and understood by and between said parties that said cattle shall not be removed by the party of the first part or taken from the section and township (section 27, township 5, range 18, in Phelps county) on which the same are herein declared to be situated, without written consent of the party of the second part (Pratt), and when removed or shipped for sale they shall be consigned to James H. Pratt, mortgagee, at South Omaha, Nebraska, to be sold on commission. The said party of the first part hereby covenants and agrees that in case the said first party shall remove or attempt to remove, or permit to be removed from said premises, or dispose of or attempt to dispose of, said stock or any part thereof, or in case the party of the first part shall fail to keep any of the agreements herein contained, or if the party of the second part shall fail in full or in part with reference to the payment of the sums of money mentioned, then in all or any of the cases aforesaid the said second party shall have the right and power to take immediate possession (personally or by agent authorized by the possession of this instrument) of all of said stock wherever found without legal process, in order to satisfy his lien." On the 16th day of December, 1895, Pratt, the mortgagee, gave one Alex. Lavery full power of attorney authorizing him to collect the notes, release the mortgages, and do everything about the contract as fully as Pratt himself could do. On Saturday, April 11, 1896, Johnston and the First National Bank of Holdrege shipped the cattle, consigned to J. H. Pratt, to Chicago, Ill. A day or two before Johnston had spoken to Mr. Engstrom, the agent of the railroad company at Holdrege, about the shipment, and had ordered cars for that purpose at that time. At the time of the shipment on Saturday the plaintiff had not paid the mortgages, which lacked some 18 days of being due, and had not notified either Pratt or Lavery that he was intending to ship the cattle, and did not have the consent written or otherwise of Pratt or his agent to make the shipment. It is claimed by plaintiff that he told Engstrom that he had Lavery's permission for the shipment to Chicago, and that he had arranged with the bank to pay the mortgages, which arrangement he says was satisfactory to Lavery; and with full knowledge of such arrangement the agent received the shipment on Saturday, and the company was therefore bound to transport the shipment to Chicago without delay. This claim is not borne out by the

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evidence, and the finding of the jury was against him thereon. The evidence given by the plaintiff is as follows: "I told Engstrom I was going to ship the cattle to Chicago, and he says, 'Have you got permission from Lavery to ship them to Chicago?' I said he told me I could. He said: 'Don't depend on what Lavery told you. You had better have a statement in writing from him before you ship, and I would advise you to get a permit before you ship.'" Plaintiff testified that he afterwards wrote to Lavery, but does not state the substance of his letter, and he never received any word in answer from Lavery, or any one representing him; that a day or two before the shipment he again saw Engstrom, who asked if he had heard from Lavery, and he said he had not; that Engstrom urged him to make an arrangement to pay the mortgages off, for fear Lavery would cause trouble, and advised him to get the money from the bank, and pay the mortgages, if he was going to Chicago with the cattle. It appears that Johnston made arrangements with the bank to make the payment to Pratt at South Omaha by means of money that he borrowed for that purpose, and the shipment was made in the name of the bank as security for the payment of the drafts, which the bank mailed to Omaha on Saturday evening after the shipment was made at noon. It further appears that, the next day being Sunday, this draft did not reach Lavery and the Omaha Bank until Monday forenoon. Lavery first saw the draft and knew it had been sent or issued on Monday forenoon of April 13th, and the only information he had about it before was Johnston's statement on Sunday, in the Exchange building in South Omaha, that the draft had been arranged for, and would be sent by the Holdrege Bank. But Johnston himself says that he simply made arrangements with the bank on Friday; did not ask the bank when they were going to send the draft, or anything about it, but supposed that they had fixed it up; and that at the time the shipment was made he did not know whether the mortgages were paid or not, took no trouble to find out, and had heard nothing from the bank at all as to whether the mortgage was paid when the shipment was made, or when it was stopped and diverted to South Omaha. When Lavery found out late Saturday afternoon that the shipment was made by inquiry by wire, Engstrom did not know anything about any arrangement with the bank, and did not know what arrangements had been made.

The record shows now, as it did before, that Lavery told Johnston that his commission firm would like very much to sell the cattle if everything was satisfactory, but, if he desired to go to other commission firms, it would be all right. This testimony does not go to the matter of shipping the stock, in violation of the provisions of the mortgages before payment, and it cannot be claimed that this casual talk about which commission firm might make the sale amounted to a consent

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to Johnston to ship when and where he pleased without having paid the debt, or having obtained the written consent of the mortgagee. Johnston admits in his testimony that his shipment was consigned to Pratt at Chicago, care of Rosenbaum Bros., in order to obtain the through rate; that J. H. Pratt was the consignee, and could have changed the shipment himself. The record therefore shows, as the jury found, that the shipment was made on Saturday, in violation of the provisions of the mortgages against the removal of the stock; that the payment had not been made; that no arrangement for payment had been made with Lavery, and that the shipment was entirely without his knowledge or consent; that the shipment was made to Pratt as the original billing required, and that the agent of the railroad company did not know that Johnston had failed to observe his warning to obtain authority for the shipment, and did not know whether payment had been made or not. So far as he knew, Pratt was the actual consignee, and entitled to the possession of the cattle, if he desired it, under his mortgage, if it had not in fact been satisfied. It further appears that during Saturday afternoon Lavery, at Omaha, learned of the shipment, and made inquiry through the railroad agent there, and was informed when and by whom the shipment was made. At that time he had given no consent for the shipment, and knew nothing of Johnston's letter concerning it, or of any attempt at payment of the mortgage debt; and he thereupon presented his mortgages and power of attorney to the agent of the railroad company, and demanded that the shipment be brought to South Omaha for his benefit. Under this state of facts the defendant was justified in diverting the property to South Omaha, and in delivering it to Lavery, as the agent of Pratt. The defendant, as a common carrier, was bound to receive the goods for carriage. It could make no inquiry as to the ownership. It has not voluntarily raised the question. It was raised by demand of the real owner before the defendant had parted with the goods. The law would have protected defendant against the real owner if it had delivered the goods in pursuance of defendant's employment, without notice of his claim. It will equally protect it against the pseudo owner, from whom it could not refuse to receive the cattle in the present event of the real owner claiming them and their being given to him. The compulsory character of the employment of a carrier furnished ample ground for so holding. *Hutchinson on Carriers* (2d Ed.) 404; *Shellenberger v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561; *Wells v. American Ex. Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; *Cleveland Co. v. Moline Co.* (Ind. App.) 41 N. E. 480; *Western Co. v. Barber*, 56 N. Y. 544; *Blivin v. N. Y. Co.*, 36 N. Y. 403. "Ordinarily, the person who delivers the goods to a common carrier is to be treated by them as the owner, and in general his title may

not be disputed by the company a *jus tertii*, or adverse title be set up, but the goods must be delivered according to his directions without putting him upon proof of his title. That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion. But should the goods be the property of a third person, who is also entitled to the possession of them, and while in the custody of the carrier such owner should demand possession, it would be justified in delivering the goods to him." Hale on Bailment and Carriers, p. 497, and cases there cited. We therefore hold that the verdict, so far as this question is concerned, is sustained by the evidence, and the instructions of the court were without error.

It is next contended by the plaintiff that he is entitled to recover damages by reason of unnecessary delay in the shipment. It appears from the evidence that after the cattle had been taken possession of by Lavery for and on behalf of the mortgagee, Pratt, and placed in the yards at South Omaha, an arrangement was made between the plaintiff and Lavery by which the cattle were again loaded into defendant's cars and forwarded by special train to Chicago. This contract of shipment appears to have been with Pratt, and to him in the care of Greer, Mills & Co. Plaintiff offered no evidence to show the ordinary and usual length of time necessary to transport the cattle from South Omaha to Chicago, and there is no proof in the record that the time consumed by the defendant in getting the cattle from the point of shipment to the place of destination was greater than ordinarily required for such purpose. So there is no evidence in the record on which to base a claim or judgment for damages for delay in transportation.

It is further contended by the plaintiff that he is entitled to damages on account of the delivery of the cattle to Greer, Mills & Co., at Chicago, instead of Rosenbaum Bros., to whom he had desired the delivery to be made. It appears when the contract of reshipment was made in South Omaha, and the cattle were forwarded to Chicago, Lavery had not yet received the draft mailed on Saturday afternoon to him by the bank at Holdrege; that, in order to secure the payment of the mortgage debt due his principal, Pratt, he had the cattle consigned to the care of Greer, Mills & Co.; that as soon as he received the draft and the mortgages were in fact paid he notified Greer, Mills & Co. to turn the property over to Rosenbaum Bros., which was done. It follows that the plaintiff was not entitled to recover any damages on that account. In fact, it is thoroughly established by the evidence that whatever delay, change of route, loss of market or weight was suffered in the shipment resulted entirely from the failure of the plaintiff to observe his obligations under the mortgage contracts, and on account of his attempting to make the ship-

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ment when he had no authority or right to do so, and against the express provisions of the mortgages. He may have been, and without doubt was, entirely honest in his attempt to arrange for their payment through the Holdrege Bank, but the payment was not made, and no consent was given for the shipment, so that to the mortgagee and to the defendant it had all the appearances of a fraudulent transaction, in which the defendant was bound to observe the demands of the mortgagee in stopping the shipment and forwarding it only to his order. All of the conditions then existed authorizing Lavery to take possession according to the terms of the mortgages. Meyer v. Michaels (Neb.) 95 N. W. 63. The fact that the money was on the way at the time the cattle were shipped, without the knowledge of Lavery or the defendant, does not affect the situation.

Plaintiff also contends that the court erred in refusing him the right to file his amended reply. It was largely in the discretion of the district judge whether he would permit the filing of the amended reply or not, and the exercise of that discretion cannot be overruled without essential and fundamental good reason. The issues in the case had been carefully made up in the county court, and also in the district court. The case had been twice tried on these issues, and the offer to file the amended reply was an attempt to introduce new issues and a new controversy into the action. The court properly exercised his discretion in refusing to permit it. Again, the right to recover on the basis of the allegation contained in the amended reply was barred by the statute of limitations. The shipment was made in April, 1896; the amended reply presenting new rights of recovery was offered for filing in May, 1902. These new grounds for recovery could become effective only from the date of the filing of the reply, which was more than four years from the carriage of the shipment and after any cause of action could accrue thereon. Buerstetta v. Bank, 57 Neb. 504, 77 N. W. 1094; Box v. Chicago Co. (Iowa) 78 N. W. 694.

We are of the opinion that the verdict of the jury was sustained by sufficient evidence, that the judgment was right, and, finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

OWENS *v.* MACON & B. R. Co.*(Supreme Court of Georgia, Dec. 12, 1903.)*

[46 S. E. Rep. 87.]

Right to Refuse to Accept Lunatic as Passenger.*

The right of other travelers to a safe and comfortable passage warrants a carrier in refusing to receive one who has been adjudged a lunatic, and who, though in charge of attendants, is loudly cursing and using obscene language at the time of boarding the car.

Same.

Common carriers cannot absolutely refuse to transport persons who are insane, but may in all cases insist that they be properly attended, safely guarded, and securely restrained.

Transportation of Lunatic—Notice to Carrier.

Where it becomes necessary to transport a lunatic, who by reason of his violence may endanger the safety or interfere with the comfort of other travelers, the carrier is entitled to seasonable notice, in order that it may make proper arrangements for his transportation.

(Syllabus by the Court.)

Error from Superior Court, Troup County; S. W. Harris, Judge.

Action by J. B. Owens against the Macon & Birmingham Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Under a writ of lunacy in Troup county, before a jury, of which the ticket agent of the railroad was a member, Josh Owens was adjudged insane, and committed to the State Sanatorium at Milledgeville. Being sometimes violent, he was handcuffed and taken to the railroad station by his brother, the plaintiff in error, and another friend, acting as guards. Three tickets from Mountville to Macon were purchased. The train stopped. The insane man was taken toward the passenger car, but the conductor instructed that he should be placed in the apartment ahead of the smoking car. Josh Owens violently resisted being put on the car, though it appears that he was not making any noise or outcry. The general manager of the railroad company happened to be on the train, and, seeing the condition and conduct of the insane person, gave instructions that he could not be carried on the train. The plaintiff replied that the lunatic would be quiet if they could get him on a seat, at which Josh Owens himself, with great noise and vehemence, began swearing, saying that he would not be quiet; and, in reply to the continued objection of the general manager to allow him passage, plaintiff stated that he would be willing to take his brother in the baggage car, which was also declined; witness for the railroad stating at the trial that it was used for carrying express and

*See note, 11 Am. & Eng. R. Cas., N. S., 835; note, 6 Am. & Eng. R. Cas., N. S., 266; note, 6 Am. & Eng. R. Cas., N. S., 271.

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breakables, and was not in a condition for the transportation of the insane man. The company's agent agreed, however, to transport him in the cab of a freight car due shortly thereafter, which offer was declined on the ground that that train did not make connection at Macon, the point it was necessary to go to in order to reach Milledgeville. There was evidence that, after the refusal to transport, the passage money was tendered and declined, and that plaintiff was obliged to take his brother in a buggy across the country to another railroad, by which he was subsequently carried to Milledgeville. There was evidence on the part of the company that there were only two passenger coaches, in one of which there were ladies, and the other was divided into two compartments, one end of which was used as a smoker, all the seats of which were occupied by passengers, the other end being used for colored people, and in which there was a colored woman passenger; that the general manager offered to carry the insane man on the next day, if he was then quiet, or he would carry him in the cab of the freight train that passed for Macon a few hours later on the same day. The petition alleged that it was the usual custom of the company to transport lunatics and persons adjudged insane, over its line to Macon, en route to the State Sanatorium, to which allegation the defendant answered that it never refused to transport lunatics when they were quiet and not in such a condition as to render themselves dangerous to passengers, and that it would have transported Josh Owens, had he not been resisting those attempting to put him on the cars, and uttering vulgar language in a loud and boisterous manner, and that when the tickets were sold, prior to the arrival of the train, Josh Owens appeared to be quiet. At the conclusion of the evidence the court directed a verdict for the defendant, and the plaintiff excepted.

H. A. Hall, for plaintiff in error.

L. F. Garrard and Longley & Longley, for defendant in error.

LAMAR, J. This was a suit by one of the guards in charge of a lunatic, but it was conceded on the argument here that he could not recover if the company was justified in refusing to transport the lunatic, and we shall therefore consider what was the carrier's obligation to the insane man. The relation of carrier and passenger creates reciprocal duties. One is bound safely to transport; the other, to conform to all reasonable regulations, and so to conduct himself as not to incommode other passengers who have an equal right to a safe and comfortable passage. Those who so act as to be obnoxious may be refused transportation or ejected. The payment of fare and the possession of a ticket do not require the carrier to transport those who are noisy or boisterous, or who threaten the safety of, or occasion inconvenience

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to, others on the train. But in the case of unfortunates who are not responsible for their disorderly conduct, and who, at best, are involuntary passengers, a different question is presented, calling in each case for the exercise of a wise discretion. On the one hand, regard must be had for the safety and comfort of other travelers, and, on the other, to the fact that in losing his mind the lunatic has not lost the right to be transported. It may be vitally important that he be taken to a place where he can receive the attention and confinement rendered necessary by his mental state. The carrier cannot absolutely refuse transportation to insane persons, but it may in all cases insist that he be properly attended, safely guarded, and securely restrained. And even where such precautions have been taken, it is not bound to afford him, if violent, transportation in the cars in which other travelers are being conveyed. And while there may be cases in which the convenience of other passengers should yield to the necessities of the unfortunate, the company may decline to receive one who at the time of entering the train exhibits signs of violence which indicate that his presence and conduct would tend to the manifest annoyance of others. So to do would ordinarily be better than to receive him on the promise of his attendants that he would be quiet, and, on the disorder continuing, force upon the carrier the duty of deciding whether he should be ejected at a station where there might not be proper accommodations. Where, however, it becomes essential to transport one who, though violent and noisy, is not responsible for his actions, the company is entitled to seasonable notice, in order that it may make proper arrangements. The action of the defendant in the present case in offering transportation on a later train, whereon others would not be incommoded, was in strict fulfillment of its double duty to the lunatic and the general public. It could not be required to place him in the baggage car, which was not intended for passengers. If the attendants were unwilling for him to be taken in the cab of the freight train, they were at least bound to give the carrier an opportunity to make other arrangements.

We find no authority directly in point, though the following cases bear more or less on the question raised: *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334; *Atchison R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Paddock v. Atchison R. Co.*, 37 Fed. 841, 4 L. R. A. 231; *Croom v. Chicago R. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557; *Louisville R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Willeys v. Buffalo R. Co.*, 14 Barb. 585; *Meyer v. St. Louis Ry. Co.*, 54 Fed. 116, 4 C. C. A. 221; *Pittsburg R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Lemont v. Washington R. Co.*, 1 Mackey, 180, 47 Am. Rep. 238, 1 Am. & Eng. R. R. Cas. 263; *Vinton v. Middlesex R. Co.*, 11 Allen, 304, 87 Am. Dec.

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714; Robinson v. Rockland R. Co., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530; Pearson v. Duane, 4 Wall. 605, 18 L. Ed. 447.

Although the ticket agent was on the jury inquiring as to the lunacy of Owens, and had notice of his mental state, the latter was not exhibiting any signs of violence when the ticket was sold, and, though the company was accustomed to convey persons insane, it was not bound to admit to its cars one boisterous, cursing, and using obscene language at the time.

There was no error of law committed, and the verdict was demanded by the evidence. Judgment affirmed. All the Justices concur.

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(*Supreme Court of Appeals of Virginia, Jan. 14, 1904.*)

[46 S. E. Rep. 292.]

Alighting Passengers—Degree of Care Due from Street Railway.*

It is the duty of the street railway to use extraordinary care and caution to see that passengers are not injured in getting on or off its cars when stopped at a regular point for stopping.

*As to the care due alighting passengers, see foot-note appended to United Rys. & Elec. Co. v. Woodbridge (Md.), 8 R. R. R. 156, 31 Am. & Eng. R. Cas., N. S., 156; Memphis St. Ry. Co. v. Shaw (Tenn.), 8 R. R. R. 255, 31 Am. & Eng. R. Cas., N. S., 255; Cincinnati, N. O. & T. P. Ry. Co. v. Bell (Ky.), 8 R. R. R. 233, 31 Am. & Eng. R. Cas., N. S., 233 (liability for injury to alighting passengers from absence of stool in customary place near platform); Fritz v. Southern Ry. Co. (N. Car.), 8 R. R. R. 243, 31 Am. & Eng. R. Cas., N. S., 243 (not liable for injury to alighting passenger from contact with boarding passenger, which could not have been anticipated); Atlanta Ry. Co. v. Randall (Ga.), 6 R. R. R. 698, 29 Am. & Eng. R. Cas., N. S., 698; Southern Ry. Co. v. Reeves (Ga.), 6 R. R. R. 870, 29 Am. & Eng. R. Cas., N. S., 870 (extraordinary care required); Southern Ry. Co. v. O'Bryan (Ga.), 6 R. R. R. 59, 29 Am. & Eng. R. Cas., N. S., 59 (duty to announce station); Foster v. Old Colony St. Ry. Co. (Mass.), 6 R. R. R. 894, 29 Am. & Eng. R. Cas., N. S., 894 (failure to sprinkle sand on car steps covered with snow); Paginni v. North Jersey St. Ry. Co. (N. J.), 6 R. R. R. 930, 29 Am. & Eng. R. Cas., N. S., 930 (not negligence per se for motorman to open gate on front platform of trolley car before car comes to full stop); Sweet v. Birmingham Ry. & Electric Co. (Ala.), 6 R. R. R. 784, 29 Am. & Eng. R. Cas., N. S., 784; Fielders v. North Jersey St. Ry. Co. (N. J.), 6 R. R. R. 875, 29 Am. & Eng. R. Cas., N. S., 875; Herbert v. St. Paul City Ry. Co. (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152 (care required in keeping car steps and platform free from ice and snow); Southern Ry. Co. v. Roebuck (Ala.), 2 R. R. R. 204, 25 Am. & Eng. R. Cas., N. S., 204; Le Blanc v. Sweet (La.), 2 R. R. R. 243, 25 Am. & Eng. R. Cas., N. S., 243; Freeman v. Metropolitan St. Ry. Co. (Mo.), 3 R. R. R. 582, 26 Am. & Eng. R. Cas., N. S., 582 (care required in stopping car); Houston & T. C. Ry. Co. v. Goodyear (Tex.), 2 R. R. R. 265, 25 Am. & Eng. R. Cas., N. S., 265; St. Louis, etc., Ry. Co. v. Farr (Ark.), 3 R. R. R. 762, 26 Am. & Eng. R. Cas., N. S., 762 (duty to inform passenger that stop is not at station); Walters v. Chicago & N. W. Ry. Co. (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237 (duty to stop at station); Simmons v. Oregon R. & Nav. Co. (Ore.), 5 R. R. R. 280, 28 Am. & Eng. R. Cas., N. S., 280 (duty to stop at safe

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Contributory Negligence—Alighting from Moving Street Car—Sudden Starting of Car.†

If plaintiff undertook to get off a street car while in motion, she was guilty of contributory negligence; but if she retained her seat until the car stopped, and reached the platform before it started, and was thrown, while alighting, by the sudden starting of the car, she was not guilty of contributory negligence.

Instructions.

It is not error to refuse instructions when the propositions of law, although correctly stated therein, are sufficiently covered by other instructions which are granted.

Error to Law and Equity Court of City of Richmond.

Action by S. M. Williams against the Richmond Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

William L. Royall, for plaintiff in error.

Edgar Allan, Jr., for defendant in error.

CARDWELL, J. The defendant in error, Mrs. S. M. Williams, brought her action in the law and equity court of Richmond City, and recovered judgment against the plaintiff in error, the Richmond Traction Company, for the sum of \$500, with interest from the 24th day of April, 1901, as damages for injuries sustained because of the negligence of the defendant, and we are asked to reverse this judgment on the grounds (1) that the court below misdirected the jury as to the law; and (2) because the verdict is contrary to the law and the evidence. The defendant below, plaintiff in error here, owns and operates an electric street railway in the city of Richmond, and one of its tracks lies in Cary street, running east and west; and it crosses at right angles Belvidere street,

place); *Doolittle v. Southern Ry. Co.* (S. Car.), 1 R. R. R. 105, 24 Am. & Eng. R. Cas., N. S., 105 (inviting passenger known to be ignorant of traveling to alight); *Raughley v. West Jersey & S. R. Co.* (Pa.), 2 R. R. R. 256, 25 Am. & Eng. R. Cas., N. S., 256 (negligence in causing sudden jar while passenger was alighting); *Montgomery St. Ry. v. Mason* (Ala.), 5 R. R. R. 316, 28 Am. & Eng. R. Cas., N. S., 316 (duty to furnish safe place to alight); *Louisville & N. R. Co. v. Harmon* (Ky.), 1 R. R. R. 76, 24 Am. & Eng. R. Cas., N. S., 76; *United Rys. & Elec. Co. of Baltimore v. Beidelman* (Md.), 4 R. R. R. 662, 27 Am. & Eng. R. Cas., N. S., 662 (negligence in starting train); *Toler v. Yazoo & M. V. R. Co.* (Miss.), 4 R. R. R. 146, 27 Am. & Eng. R. Cas., N. S., 146 (not stopping train long enough for passenger to alight); *Owen v. Washington & C. R. Ry. Co.* (Wash.), 4 R. R. R. 667, 27 Am. & Eng. R. Cas., N. S., 667 (nonsuit properly denied where conductor invited man ninety-one years old to alight on side of platform); monographs, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904 (duty to allow reasonable time to alight); 3 R. R. R. 589, 26 Am. & Eng. R. Cas., N. S., 589 (injuries from jerks and jolts); 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904 (discharging passengers).

†As to contributory negligence in alighting from moving car or train, see foot-note appended to *Lee v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 8 R. R. R. 923, 31 Am. & Eng. R. Cas., N. S., 923, where all the preceding authorities in this series are collected; *Louisville, H. & St. L. Ry. Co. v. Coons* (Ky.), 8 R. R. R. 925, 31 Am. & Eng. R. Cas., N. S., 925; *Hunterson v. Union Traction Co.* (Pa.), 8 R. R. R. 927, 31 Am. & Eng. R. Cas., N. S., 927.

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on which the Richmond, Fredericksburg & Potomac Steam Railroad has a track, upon which steam cars are operated.

An ordinance of the city of Richmond relative to the conduct of street railways operated within the city contains the provision that, "at every point of intersection of either street car line with a steam railroad, the street car company's cars shall come to a full stop before crossing the tracks of the steam road, and the steam road in each case shall have the right of way," etc.; and one of the printed rules of the plaintiff in error reads as follows: "(16) Steam Railroad Crossings. Motormen must bring their cars to a full stop, not nearer than twenty-five feet to the nearest track—meaning, the nearest track of the steam railroad. The motorman must not proceed with his car until the conductor has gone ahead onto the steam railroad track and looked both ways and given a signal to start. The motorman will also observe the utmost watchfulness for approaching trains, and should, in his judgment, danger be imminent from any source he will refuse to start his car until the crossing is clear and free from all danger. When the conductor has gone ahead of car, before starting, the motorman will look back and see that there is no one getting on or off the car. * * *". Another of the plaintiff in error's rules provides: "(39) Approaching Street and Railway Crossings. Approach all street and railway crossings with care, and your car under perfect control; cross the street before stopping."

On the 24th day of April, 1901, the defendant in error was a passenger on one of the cars of the plaintiff in error, having gotten on the car at First and Broad streets, and was going to her home, on Belvidere street, near Cary street. When the car reached the east side of Belvidere street, it came to a full stop, in accordance with the rules of the plaintiff in error, and the conductor went forward to view the steam railroad tracks, to ascertain whether his car could proceed further without danger of collision with the steam cars; and, observing the approach of no steam cars, he signalled the motorman to go forward. In the meantime the defendant in error had left her seat in the car, and was in the act of alighting upon the street, when the car was suddenly started with a severe jerk, throwing her upon the street, causing her the injuries for which this suit was brought. Her contention at the trial was that by custom the place at which she attempted to leave the car had become a regular stopping place for passengers to alight, and that before approaching that point she signaled to the conductor with her hand to stop the car for her to alight, and she supposed he understood and agreed to her signal, whereupon she got up and walked out upon the back platform, supposing that the conductor would be there to assist her off, but when she got upon the rear platform she found that the conductor had gone to the steam road, and, reaching it, and without looking

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back, he signaled the motorman with his hand to come on, and, the motorman applying the electricity, the car gave a sudden jerk, that threw her to the ground and injured her.

On the other hand, the theory of plaintiff in error was that the defendant in error either attempted to get off the car while moving, thereby contributing to her own injuries, or that, after reaching the rear platform at the steps, instead of getting off of the car, she delayed, and thereby lost her opportunity to get off before the car started. In other words, the contention of the defendant in error was that she received her injuries by reason of the neglect of the plaintiff in error to perform its duty to her, under the law, as a passenger, and in violation of its own rules and regulations, while the theory of the plaintiff in error was that the defendant in error, by her own negligence, contributed to her injuries, whereby she was barred of any recovery in this action.

The defendant in error at the trial asked for two instructions, which the court gave. The second relates to the measure of damages in such an action, and is free from objection, and will therefore not be further noticed. The first instruction is as follows:

"The court instructs the jury that it is the duty of common carriers, such as street railway companies, to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant company, their servants and employees, to take due and proper precaution to see that no one was in the act of alighting before moving their car ahead after the same had been stopped at a regular point for stopping; and if the jury shall believe from the evidence that the plaintiff, Mrs. Williams, without negligence on her part, was in the act of alighting from said car, and that the defendant company, their servants or employees, failed to perform their duty in this behalf, and by reason thereof the plaintiff was injured, then the jury shall find for the plaintiff."

This instruction, we think, was clearly right, as it presented the rule of law which this court has frequently laid down with reference to the liability of a street car company to use the utmost care and diligence for the safety of passengers. The most recent case on the subject is that of *N. & A. Ter. Co. v. Morris' Adm'x* (Va.) 44 S. E. 719. The evidence tended to show that the defendant in error in this case was seeking to leave the car at a point which, by custom, known to the plaintiff in error, had become a regular stopping place where passengers left the car, and she was on this occasion, as she had frequently done before, alighting from the car near her home.

Plaintiff in error asked for five instructions, marked "A," "B," "C," "D," and "E," of which the court refused to give "D" and "E," and modified "A," "B," and "C;" the court giving the instructions as modified as its own instruc-

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tions, numbering them Nos. 3, 4, and 5. Instruction "A," modified, was as follows:

"If the jury believe from the evidence that the plaintiff undertook to get off of defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action."

And in lieu of this instruction the court gave the following:

"If the jury believe from the evidence that the plaintiff undertook to get off the defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action; but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part."

If it be conceded that a passenger on a street car is guilty of negligence by leaving his seat while the car is in motion, as to which we express no opinion, instruction "A" contained a mere abstract proposition of law, which was calculated to mislead the jury in this case; and the court was clearly right in qualifying it by adding thereto, "but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part." We are further of opinion that this instruction, as given by the court, together with its fourth and fifth instructions, sufficiently covered every proposition of law contended for in the instructions asked for by the plaintiff in error which were refused. The instructions as given submitted more clearly to the jury the issues presented by the testimony in the case, and it is not error to refuse instructions when the propositions of law, although correctly stated therein, are sufficiently covered by other instructions which are granted. *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

We shall not attempt to review in detail the evidence in the case. This is a very different case from that of a trespasser, a licensee, or of a person crossing a street, with rights only equal to those of a railroad company. Here it was a passenger towards whom the railroad owed the highest diligence. While the defendant in error may have known that the regular stopping point at which to take on or put off passengers was on the opposite side of Belvidere street, the evidence was ample to show that by custom, well known to plaintiff in error, its cars had been stopping on the east side of Belvidere street, at which point passengers constantly got off.

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The jury, therefore, was well warranted in finding that the defendant in error was not guilty of negligence merely by the fact that she attempted to leave the car at that point after it had come to a full stop. It was the duty of the employees of the company to be on the alert to see that passengers seeking to alight from the car at that point were not put in peril by doing so, when, by the exercise of ordinary care on the part of these employees, danger to them might be averted. Whether these employees were negligent in the performance of these duties, as well as the question whether or not the defendant in error was guilty of negligence contributing with that of the plaintiff in error, and causing her injury, was a question of fact for the jury; and, these questions having been submitted fairly to them by the instructions given by the court, we cannot say that the verdict of the jury is without evidence or against the evidence.

Upon the whole case, we are of opinion that the judgment should be affirmed.

BUCHANAN, J., absent.

STATE, to Use of MUMMAUGH *et al.* v. WESTERN MARYLAND R. CO.

(*Court of Appeals of Maryland, Dec. 4, 1903.*)

[56 Atl. Rep. 394.]

Injury to Shipper Delivering Stock—Negligence in Starting of Car—Sufficiency of Complaint.*

A count of a narr. alleging that deceased, for the purpose of having a calf transported by defendant carrier, delivered it at its station, and, on arrival of the train, entered the market car to deliver the calf, in pursuance of a custom of persons having live stock to ship by defendant's cars, and that the train was negligently started, killing deceased, while he was in the exercise of due and reasonable care in leaving the car, states a cause of action, whether alleging that his entry into the car was with the "knowledge" of defendant's agents in control of the

*As to the care due persons on railroad company's premises to transact business with it as a common carrier of freight, see note, 21 Am. & Eng. R. Cas., N. S., 310 et seq.; *Kansas City Southern Ry. Co. v. Moles* (C. C. A.), 8 R. R. R. 22, 31 Am. & Eng. R. Cas., N. S., 22 (care due in switching cars to persons on or about track engaged in unloading them); *Holcombe v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 482, 31 Am. & Eng. R. Cas., N. S., 482 (same care due licensees as passengers in unloading baggage at depot); *Central of Georgia Ry. Co. v. Duffy* (Ga.), 6 R. R. R. 660, 29 Am. & Eng. R. Cas., N. S., 600 (liability to licensee engaging in loading cars as affected by ignorance of trainmen of his presence; and liability as affected by fact that his employer had been notified by company to withdraw him); *Hathaway v. New York, N. H. & H. R. Co.* (Mass.), 5 R. R. R. 478, 28 Am. & Eng. R. Cas., N. S., 478 (failure to light platform in freight yard); *Ryan v. New York, N. H. & H. R. Co.* (N. Y.), 3 R. R. R. 699, 26 Am. & Eng. R. Cas., N. S., 229 (duty to protect employees of consignee unloading car); *Meuer v. Chicago, Milwaukee, etc., R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 493 (liability for negligence resulting in injury to shipper).

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car, or with their "knowledge, consent, acquiescence, and approval," or "at the invitation and on the request of defendant"; the assent being inferred from the knowledge and custom, and in either case he not being a mere volunteer.

Pleading—Legal Conclusion.

Allegation in a narr. that deceased was "lawfully" on defendant's car when killed is a mere conclusion.

Appeal from Circuit Court, Carroll County.

Action by the state, to the use of Mary Elizabeth Mummaugh and others, against the Western Maryland Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Jas. A. C. Bond, for appellant.

Benjamin F. Crouse, for appellee.

FOWLER, J. This is an action brought in the circuit court for Carroll county by the state, to the use of Elizabeth Mummaugh and others, against the Western Maryland Railroad Company, for damages caused by the alleged negligent killing of George W. Mummaugh. The defendant demurred to the whole narr., and the demurrer was sustained by the learned court below. Judgment on demurrer was given in favor of the defendant, and the plaintiff has appealed. The only question, therefore, presented, is whether the narr., or either count thereof, sets forth a good cause of action, for, if there be one good count, the demurrer should have been overruled. We will proceed to examine the several counts as briefly as may be:

It appears that an amended narr., containing one count, was filed on the 7th day of February, 1903. On the 22d May following, the additional or second count was filed, and finally, three days thereafter, the narr. was again amended by filing the additional or third count. Which, if any, of these counts states a good cause of action? The answer to this question ought, in this state, to be free from difficulty, in suits like this to recover damages caused by negligence, because the appropriate forms of pleading which have been so frequently approved by this court are brief and simple. The various counts of the narr. we are to consider are, however, characterized by unusual length. Each of the counts alleges that on the 28th June, 1901, Mummaugh, intending to have certain property, to wit, a calf, transported by the said defendant, a common carrier, from one of its stations, delivered said calf on the market platform of the defendant at said station, and that on the arrival at that station of the train the said Mummaugh entered the car known as the "Market Car" of the defendant. In the first count it is alleged that he entered the car with the knowledge of the defendant's agents, etc., in control of the train, and in pursuance of a custom of persons having live stock to transport by the defendant's

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cars, while in the second the allegation is that the entry on the car to deliver the calf was made with the full knowledge of said employees, and with their consent, acquiescence, and approval, and in accordance with the custom, as in the first count. The third alleges that he entered the car at the invitation and upon the request of the defendant, and in pursuance of the custom relied on in the other counts; also the allegation of negligently starting the train, and the injury thereby inflicted upon Mummaugh, while he was in the exercise of due and reasonable care in leaving the car, is common to all the counts.

There can be no question that, if Mummaugh was lawfully on the car of the defendant, it will be liable in damages, if his death was caused by its negligence; he being free from contributory negligence on his part. In *New York, etc., R. Co. v. Coulbourn*, 69 Md. 367, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430, where the plaintiff was injured while leaving the car, former Chief Judge Alvey, in delivering the opinion of this court, said: "The plaintiff entered the car for a lawful purpose, and was therefore rightfully in the car for such time as was reasonably sufficient to enable him to transact the business for which he entered it. The defendant, by its agents and servants, was bound to afford reasonable time for the transaction of the business before moving the train, and was also bound to give proper warning of the purpose to put the train in motion, to enable the plaintiff, by the use of reasonable care and diligence, to leave the car without the risk or injury to himself in the act of getting off."

The contention of the defendant is that Mummaugh, according to the allegations of the narr., is a mere volunteer, and that it is immaterial whether the injury occurred while assisting the defendant's employees gratuitously or at their request. But we do not think this position is reasonable, and certainly no authority was cited to sustain it. *Thompson on Negligence*, p. 1045, § 42, is one of the authorities we find on appellee's brief. The author refers to several English cases, which, in our opinion, so far as this objection is concerned, establish the correctness of each count of the narr. here demurred to. The author, after laying down the general rule that a mere volunteer cannot recover, says that care must be taken, however, to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of their master. In the case of *Holmes v. Northeastern R. Co.*, L. R. 4 Exch. 254, affirmed in *Exchequer Chamber*, L. R., 6 Exch. 123, it appears that the plaintiff was a person entitled to the delivery of a wagon load of coal from the defendant railway company. The usual mode of delivery was impossible, by reason of the crowded state of the station. He was hence allowed by the company's agent to go to another place; and, while so doing, he fell through a hole, and was

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injured, owing to the negligent keeping of the company's premises. It was held that he was engaged, with the consent of the company, in a transaction which entitled him to have the company's premises kept in a reasonably safe condition. Channell, B., said: "We must infer from the silence of the station master [the defendant's agent] that he acquiesced in the plaintiff's going onto the siding [where the injury happened] for the purpose of getting coal in the way in which he did get it." Kelly, C. B., said: "Although no express permission was given, neither was there any prohibition." This is equivalent to saying that the employee knew the injured person was entering the defendant's premises, and, if there was no prohibition, the consent of the company must be assumed. It was held that, although not getting his coal in the usual way, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was entitled to recover for the injury. The preceding case was cited in *Wright v. London & N. W. R. W. Co.*, L. R. 1 Q. B. Div. 252; Lord Coleridge, C. J., saying that it was a case of the greatest authority, because in the Exchequer Chamber seven judges affirmed the decision for the reasons given by the judges of the Court of Exchequer. The facts of the last-named case were as follows: The plaintiff sent a heifer by defendants' railway. On the arrival of the train at the station, there being only two porters available to shunt the car to a siding, from which alone the heifer could be delivered to the plaintiff, in order to save time he assisted in shunting the car, and while so doing he was run against and injured through a train being negligently allowed by defendants' servants to come out of the siding. There was evidence that the station master knew that the plaintiff was assisting in shunting, and assented to his doing so. It was held that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods, and the defendants were therefore liable to him for the negligence of their servants. Lord Coleridge said: "The plaintiff assisted in the shunting, * * * and that that was done with the assent of the station master is proved by evidence which satisfied the Court of Queen's Bench, and satisfies us. * * * It was also proved that it was common practice for persons to assist in shunting the cattle trucks." In another part of his opinion, Lord Coleridge says: "We must take it that the station master acquiesced, and so authorized the way in which the plaintiff assisted in getting delivery of his heifer. * * * It is plain, therefore, that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all risk upon himself." Counsel for the defendant contended that *Holmes v. Northeastern R. Co.*, supra, was a very different case from *Wright v. Railway Co.*,

supra, because the injury arose in the latter case not from the state of the premises, but from the negligence of servants; but the court did not agree with him. Opinions were also delivered by the other judges to the same effect. The opinion of James, L. J., is certainly to be commended for its brevity. It is as follows: "I think it would be a shocking state of the law if a person, in the position the plaintiff was, could not recover. I am glad to find that the case of *Holmes v. Northeastern R. Co.* has established a principle within which this case falls, which is in accordance with common sense." But it appears from the report of *Holmes v. N. E. R. Co.* that several of the judges, although they agreed the plaintiff should recover, had considerable doubt as to the correctness of their conclusion, although founded, as Justice James says, on common sense.

Tested by the law of the cases we have just cited, there can be no possible doubt that the second and third counts state a good case, for the second alleges that Mummaugh entered the car to deliver his property to the defendant with the knowledge, consent, acquiescence, and approval of its employees, etc., and according to a custom and practice of people shipping live stock so to do; and the third, that such entry was made by Mummaugh on the invitation and at the request of said employees, and also according to the custom relied on in the second count. The first count fails to allege either an invitation or request or any express assent on the part of the employees. But it does allege their knowledge, as well as the custom and practice. It seems to us that if it be proved to the satisfaction of the jury that the employees had knowledge that Mummaugh had gone upon the train to deliver his property for transportation, and, further, that such entry was according to the usual course of business (that is to say, according to the custom and practice before mentioned), the jury not only could, but it would have been their duty to, draw the inference that Mummaugh's entry on the car was with the assent of defendant. In the course of his opinion in *Wright v. L. & N. W. R. W. Co.*, supra, Cleasby, B., said that that case "seems to have established that where a man is on the premises of a railway company for the purpose of carrying into effect a contract of carriage and delivery, and gets the assent of the company (as indicated by the usual course of business) to assist in the delivery, the plaintiff is entitled to redress if the part of the premises where he is engaged is dangerous to persons engaged upon it, and injury ensues to him." The cases we have cited hold, as we read them, that when a person enters upon the car or train of a railroad company to deliver his property for transportation, and this entry is made with the knowledge and assent of the company, and according to a custom so to do, or if he enters with the company's knowledge, assent, acquiescence, and approval, and according to said custom, or if he enters on

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the invitation and at the request of the railroad company to deliver his property for shipment, the railroad company is bound, by the exercise of prudence, reasonable care, and skill, to see that he is not injured, and that if, as alleged in each count of the narr., the injury was caused directly by the wrongful act, negligence, and default of the railroad company, and without negligence on the part of the person injured, the latter should recover.

Being of opinion that the several counts of the narr. here demurred to are substantially within the rule approved by the foregoing decisions, and, as James, L. J., says, according, also, "to common sense," we will have to overrule the demurrer to the narr., with one exception. The second count appears to allege that Mummaugh was lawfully in and upon the car for the purpose of delivering his property for shipment. Whether he was so (that is, legally in the car for the purpose named) is the chief question in the case, and this, of course, is a question of law, and not of fact, and hence it was error to allege it in the narr. But there still remains the third count, which, under any aspect of the case, we think is good.

We are not aware that the narr. has been criticised on any other grounds than on those we have discussed, and, being of opinion that the demurrer should have been overruled, the judgment appealed from will be reversed. Judgment reversed, with costs, and case remanded for new trial.

PENNSYLVANIA RAILROAD COMPANY, Plff. in Err., v. WILLIAM HUGHES and Benjamin F. A. Fleming, Trading as Hughes & Fleming.

(Argued November 5, 1903. Decided December 7, 1903.)

[24 Sup. Ct. Rep. 132.]

Federal Question—Limitation of Liability in Interstate Carriage.

Whether the highest state court should apply the law of the place of contract to a controversy respecting the right of a common carrier to limit its liability for negligence to the agreed valuation is not a Federal question which will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court.

State Decisions—Review by Federal Courts.

The highest court of the state may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied.

Limiting Liability—Valuation of Shipment—State Decision—Interstate Commerce.

The refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of the Act to Regulate Commerce of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines.

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Same—Same—Same—Same.

No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability.

In Error to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed the judgment of the Court of Common Pleas of Philadelphia in favor of plaintiff in a suit to recover for a loss resulting from the negligence of a carrier in transporting a shipment of property. Affirmed.

See same case below, 202 Pa. 222, 51 Atl. 990.

Statement by Mr. Justice Day:

The defendants in error brought suit in the court of common pleas of Philadelphia against the Pennsylvania Railroad Company, to recover for injuries to a horse shipped by them from Albany in the state of New York to Cynwyd, in the state of Pennsylvania. The shipment was under a bill of lading of the New York Central and Hudson River Railroad Company, bearing date of August 10, 1900. It recited the receipt of the horse—

“for transportation from — to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz.:

“That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per —, which is the lower published tariff rate, upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

“If horses or mules—not exceeding \$100 each.”

The through rate of freight was not filled out in the blanks in the shipping receipt of the bill of lading, but was collected by the agent of the Pennsylvania Railroad Company at Cynwyd, and it appears was the reduced tariff rate usually charged on such shipments where the limited liability clause above recited is inserted. The shipper signed the bill of lading, which contained the following stipulations:

“Thomas Grady does hereby acknowledge that he had the option of shipping the above-described live stock at a higher

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rate of freight according to the official tariffs, classifications, and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned."

The agreement further provided:

"No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

Upon the trial the jury returned a verdict in favor of the plaintiff for \$10,000, and judgment was rendered accordingly. The horse was transported in safety to the end of the line of the receiving carrier, and delivered to the defendant company, and injured while the car in which he was shipped was standing on the tract of the Pennsylvania Railroad Company in the city of Philadelphia, it being run into by heavily laden cars.

Upon appeal to the supreme court of Pennsylvania, the judgment was affirmed. 202 Pa. 222, 51 Atl. 990.

Mr. John G. Johnson for plaintiff in error.

Mr. A. S. L. Shields for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court:

The right to review the judgment of the supreme court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the Federal Constitution or statutes which was denied to the plaintiff in error by the adverse holding of the state court.

Upon the trial in the common pleas court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of \$100. The court refused to so charge, but holding that the policy and law of Pennsylvania, as declared by her courts of last resort, did not permit such limitations on the liability of common carriers, left to the jury to determine the value of the horse, and the question of the negligence of the defendant.

In view of being carried to the supreme court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

"1. That it was lawful in the state of New York for the carrier to limit its liability by a special contract for an injury

resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this state, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which state it was partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

"2. That the plaintiff is not entitled to recover in excess of \$100."

Neither of these assignments of error presents a Federal question in such sense as to give this court jurisdiction to review the judgment of the state court under § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege, or immunity under the Federal Constitution or laws set up and denied in the state courts. *Beals v. Cone*, 188 U. S. 184, 47 L. Ed. 435, 23 Sup. Ct. Rep. 275.

The first error assigned in the common pleas court raised the question as to the law of the contract. It does not assert that any Federal right was invaded or denied. It seems to have been conceded at the trial that the law of the state of New York, where the contract was made, permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States (*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. Rep. 151), wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assumes liability only to the extent of such agreed valuation in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations. But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority. In *Grogan v. Adams Exp. Co.*, 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134, the supreme court of Pennsylvania expressly declined to follow the rule laid down in *Hart v. Pennsylvania R. Co.* adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from neg-

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ligence. The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart Case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amendable to review in the Federal Supreme Court where some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied. *Bethell v. Demaret*, 10 Wall. 537, 19 L. Ed. 1007; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. 666, 20 L. Ed. 759; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. Ed. 709; *United States v. Thompson*, 93 U. S. 586, 23 L. Ed. 982.

In the supreme court of Pennsylvania a further assignment of error was made as follows:

"III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled 'An Act to Regulate Commerce.' Section 1 of said act clearly provides that where the transportation is from one state to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the state in which it may be performed, or in conflict with the policy of the United States as laid down in the Federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract."

Of this assignment of error, Mr. Justice Potter, delivering the opinion of the supreme court of Pennsylvania, said:

"The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

Upon the authority of *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 533, 46 L. Ed. 674, 22 Sup. Ct. Rep. 446, it may be admitted that the question of the decision of the state court being in contravention of the legislation of Congress to regulate interstate commerce was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the

recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination.

While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 614-635, 42

Pennsylvania R. Co. v. Hughes, etc

L. Ed. 878, 885, 18 Sup. Ct. Rep. 488, 496, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:

“These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.”

In the absence of Congressional legislation upon the subject, an act of the legislature of Alabama, to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose, was sustained in *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

An enumeration of the instances in which this court has sustained the validity of local laws intended to promote the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property owners, is given in the opinion by Mr. Justice Brown, in *Cleveland, C., C. & St. L. R. Co. v. Illinois*, 177 U. S. 514-16, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722.

The case of *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289, is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: “That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount not exceeding the sum of \$500.00.” The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: “No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into.” Iowa Code of 1879, § 1308. The trial court charged that the limitation contained in the contract was void, and a verdict of \$1,000.00 damages was returned. A judgment on the verdict was affirmed in the supreme court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state, for acts of non-feasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa,—which is the only matter presented for decision in this case,—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of Congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to

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be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

The judgment of the Supreme Court of Pennsylvania is affirmed.

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(*Supreme Court of Missouri, Division No. 1, Dec. 23, 1903.*)

[77 S. W. Rep. 723.]

Injury to Employee of Consignee—Right to Presume as to Safe Condition of Car.

The servant of a consignee, suing a carrier for injuries from a defective railroad car, who knew that cars similarly received often possessed the same defects, had no right to rely on a presumption that defendant had supplied a car in such repair as would enable him to unload it in safety.

Same—Defective Car—Duty of Intermediate Carrier.

The duty of an intermediate carrier is to inspect a car to see that it is in proper condition to be received by the ultimate carrier, but it owes no duty to the servant of the consignee, rendering it liable for injury from a defective car.

Appeal—Remand.

Where a judgment for plaintiff is reversed because defendant owed plaintiff no legal duty, and therefore could violate none, the case will not be remanded.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by John W. Sykes against the St. Louis & San Francisco Railroad Company. From a judgment for defendant, plaintiff appealed to the St. Louis Court of Appeals, from which court, after reversal, the case was certified in the Supreme Court. Judgment of the Court of Appeals affirmed, with direction not to remand.

J. T. Woodruff and L. F. Parker, for appellant.

Thos. B. Harvey, for respondent.

MARSHALL, J. This is an action for personal injuries. The plaintiff recovered \$1,500 damages in the circuit court. The defendant appealed to the St. Louis Court of Appeals, and that court reversed the judgment, and ordered the case remanded to the circuit court for a retrial. One of the judges of that court concurred in reversing the judgment, but not in remanding the case, and deemed the order remanding the case to be in conflict with the decision of this court in *Roddy v. Railroad*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A.

746, 24 Am. St. Rep. 333; and for this reason that court certified the case to this court, under the sixth amendment to article 6 of the Constitution, and the case is therefore here for determination as in case of jurisdiction obtained by ordinary appellate process.

The suit was originally against both the defendant railroad and the St. Louis Car Wheel Company. The trial court nonsuited the plaintiff as to the St. Louis Car Wheel Company, and the plaintiff recovered a judgment in that court against the railroad company.

The case made is this: The plaintiff was a common laborer in the employ of the St. Louis Car Wheel Company. That company was engaged in the business of making and repairing car wheels. Its place of business was located between the tracks of the Wabash and Missouri Pacific Railroads, and each of said roads had switch tracks running into and upon the property and place of business of the car wheel company, over which cars were run carrying new wheels from, or old wheels into, the place of business of the car wheel company. The defendant had no tracks running to the premises of the car wheel company. It was a part of the plaintiff's business to unload the old wheels so brought to the premises of the car wheel company, and he had been so engaged for about three years before the date of the accident complained of. On January 17, 1898, defendant's coal car No. 5,149, loaded with coal, was delivered by defendant, at Nichols Junction, to the Kansas City, Ft. Scott & Memphis Railroad Company, and consigned to a consignee at Kansas City. It was inspected by defendant's inspector at that time, and found to be in good condition. After delivery of the coal to the consignee at Kansas City, the Kansas City, Ft. Scott & Memphis Railroad Company loaded the car at Kansas City with old car wheels that were consigned by one Jarvis, at Kansas City, to the St. Louis Car Wheel Company, at St. Louis. The car was properly inspected by the Kansas City, Ft. Scott & Memphis Railroad Company at the time of so loading it, and it was then found to be in good condition. The Kansas City, Ft. Scott & Memphis Railroad Company billed the car to Nichols Junction, and carried it to that place, where it was delivered to the common agent of that company and of the defendant; and that agent, acting for the defendant, billed the car to the car wheel company at St. Louis. The car was inspected by the defendant's inspector at Nichols Junction, and found to be in good condition. The car was hauled by the defendant from Nichols Junction to the eastern terminus of the defendant's road (at that time), at Chouteau avenue, in St. Louis, and there delivered to the Missouri Pacific Railroad, and by it hauled over its tracks to the premises of the St. Louis Car Wheel Company, and was delivered to that company on January 29th. It remained there until the morning of January 31st, when the foreman of the car wheel company ordered the

plaintiff and other workmen to unload the car, which they proceeded to do; and in the doing of it, and while moving one of the wheels, the plaintiff stepped into a hole in the floor of the car, his right foot and leg went down through the hole, he was thrown down, and the car wheel rolled back onto his leg and broke it. The hole was eight or nine inches long and four or five inches wide. The plaintiff's testimony and that of his witnesses is to the effect that the hole appeared to be an old break; that there were other holes in the floor of the car, which had been covered over with planks; that the floor of the car was rotten; that there were trash and straw and ice on the floor of the car, which hid the condition of the floor; and one witness said that the hole into which the plaintiff stepped appeared to have been covered with a piece of bark and with trash and straw. The plaintiff testified that he had unloaded many cars before; that it was a very common occurrence for cars to come there with holes in their floors, and that some of them would have planks laid over the holes; that he saw cars there with holes in their floors every day; that the cars of the Burlington Road were the worst, and that it was a common occurrence for the cars of that road to have holes in the floors; that it was not so common for the cars of other roads to have such holes, but that he saw holes in other cars often. He further testified that, when the men started to unload this car, they had to shove the trash away, so that the door of the car would rest flat on the floor of the car; that he never examined this car, before commencing work, to see whether there were any holes in the floor, and never paid any attention to that matter; that he did not see anything wrong with the floor, and did not look for anything; that there was nothing to prevent his seeing whether there was anything wrong with the car, as he had good eyes, but that he did not apprehend any danger, and did not examine the floor of the car at all before he was hurt. It appeared that the defendant charged and collected from the car wheel company the sum of \$33.95 for hauling the car from Nichols Junction to St. Louis. It also appeared that, when the defendant delivered cars that were consigned to the car wheel company to the Missouri Pacific Railroad Company, the defendant ceased to have any control over them, or to have anything further to do with them. It also appeared that the Missouri Pacific Railroad charged \$2 per car for hauling the car from the terminus of the defendant's road to the premises of the car wheel company; and the plaintiff contends that the defendant included that charge in its bill, and collected it from the car wheel company and paid it to the Missouri Pacific Railroad Company, and that in rendering the service the Missouri Pacific Railroad Company only acted as the agent for the defendant. On the other hand, the defendant claims that the Missouri Pacific Railroad was an independent connecting carrier, and that, when the defendant

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turned over the cars to the Missouri Pacific Railroad, the power, authority, and control of the defendant over the car ceased, and therefore its liability with respect to the car ceased, and that the Missouri Pacific Railroad Company became the connecting carrier to transport the car to its destination, and that this is true without regard to how many miles that company had to haul the car. There is no substantial evidence to support the plaintiff's contention that the defendant collected the charges of the Missouri Pacific Railroad for switching or hauling the car, nor that that road was merely acting as an agent of the defendant in hauling the car from the terminus of the defendant's road to the premises of the car wheel company. So far as the record here discloses, the defendant was an intermediate connecting carrier in this case.

At the close of the whole case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted. As before stated, the car wheel company also demurred to the evidence, and the court sustained the demurrer as to that company. The defendant stood upon its demurrer to the evidence, and asked no other instructions. At the request of the plaintiff, the court gave six instructions, but, as the fifth related to the measure of damages, and the sixth related to the burden of proof, and as no point is made here as to those instructions, they need not be reproduced. The other four instructions given for the plaintiff are as follows:

"(1) The court instructs the jury that if you believe and find from the evidence in the case that, at the time of the injury complained of by plaintiff, he was engaged at work in the employment of defendant St. Louis Car Wheel Company in unloading car wheels from a car which had been run in and upon the premises of said car wheel company by the defendant St. Louis & San Francisco Railroad Company, to be by it, the said car wheel company, unloaded; the said railroad company being engaged in and paid for the hauling of freight to and from said premises for said car wheel company upon cars furnished by said railroad company, and then and there to be unloaded upon said premises of said car wheel company; said transportation of freight and unloading of the same as aforesaid being for the mutual benefit of the said railroad company and said car wheel company; and that the plaintiff, at the instance and command of his employer, the said car wheel company, was at the time of the alleged injury engaged in unloading a car, as aforesaid, furnished by the defendant the railroad company; and that, in the performance of said duty by the plaintiff or others, it became and was necessary to stand and move about on the floor of said car; and that said car was then and there in an unsafe condition, by reason of the floor having holes and pitfalls therein, and that the defendants knew of the condition

of said floor, or by the exercise of a reasonable degree of care and diligence could have known of its condition; and that plaintiff did not know of the condition of said floor until the happening of the injury complained of, and that the defect and holes aforesaid were not patent to him, such as would have been disclosed to him, had he been ordinarily observant; and that while plaintiff was so engaged as aforesaid in the service of said car wheel company, unloading from a car furnished aforesaid, then and there loaded with car wheels consigned to said car wheel company, he was hurt, injured, and damaged by the floor of said car being out of repair, and with holes and pitfalls therein, as aforesaid, and that the injury occurred without the fault or negligence of plaintiff contributing thereto—then your finding should be for the plaintiff.

“(2) The court instructs the jury that if you believe and find from all the evidence in the case that the defendant the railroad company was engaged in transporting over its railroad, to and on the premises of the defendant the car wheel company, for a valuable consideration, cars to be unloaded by said car wheel company on its premises aforesaid, then it became and was the duty of the railroad company to furnish cars in such a state of repair that the said car wheel company and its employees could, with reasonable care and prudence, safely go upon and work upon them in order to do the necessary things for the unloading of the cars. And if you should find that the plaintiff, before the time of the alleged injury, did not know that the car furnished as aforesaid by the railroad company was not in a safe condition and repair, he had a right to presume that the defendant railroad company had done its duty, and that said car was in such a state of repair and condition as would enable him to do his work with reasonable safety, and he had a right to rely and act upon such presumption.

“(3) The court further instructs the jury that if you believe and find from the evidence in the case that the plaintiff did not know of the alleged condition of the floor of said car until after the happening to him of the injury referred to in the testimony, and that the condition would not have been observed by him by the exercise of ordinary care and reasonable prudence on his part, it was not incumbent upon plaintiff to search and examine for defects in the floor of said car not so observable, but that he had a right to assume that said car was in suitable and safe condition for the doing of the necessary labor on the same necessary to the unloading thereof.

“(4) If the jury believe and find that the defendant railroad company kept inspectors at Nichols Junction or other points on its railroad line intermediate between the points from which they may find the alleged car was received, loaded for transportation to the defendant car wheel company, at the city of St. Louis, and that said inspectors were charged by

the railroad company with the special duty of examining into the condition of cars at those points, and seeing that they were in a safe and proper condition, before they were suffered to depart therefrom, then the defendant railroad company is liable to plaintiff for any neglect of duty on the part of such inspectors and repairers whereby plaintiff was injured, if the jury believe that said inspectors were negligent. If the jury believe he was so injured in consequence of such neglect of duty, then said railroad company would be likewise liable, if such injury resulted because of the careless and negligent performance of said duty by said car inspectors."

There were a verdict and a judgment for the plaintiff for \$1,500. The defendant appealed to the St. Louis Court of Appeals, where, as above stated the judgment was reversed, and the cause ordered remanded, and then the case was certified to this court for the reasons stated.

1. Instructions.

It is apparent that the instructions given at the plaintiff's request were modeled after the instructions given for the plaintiff in the case of Roddy v. Mo. Pac. Railroad Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, and it is equally clear that this case was tried by the plaintiff and the trial court upon the theory that that case affords an exact precedent and parallel for this case. An analysis of that case, and a comparison of it with the facts in this case, will easily demonstrate that the principles underlying the two are not all the same, and that, while much that is said in that case applies equally to this case, the two cases, in their final essentials, are not at all alike, and the ground upon which the plaintiff's cause of action was rested in that case is not present at all in this case, but that the crucial question in this case was not involved or decided in that case. The Roddy Case was this: One Pickle owned a rock quarry about three miles from Warrensburg, a city located on the line of the railroad. The railroad built a branch road from the main line to a point near the quarry for the purpose of affording easy shipping facilities for Pickle's rock. From the branch road Pickle built a switch track or road to his quarry for the purpose of running and standing cars upon it while being loaded. The railroad, when requested by Pickle, delivered the cars on its branch road at the switch, and Pickle's employees moved the empty cars from the branch road onto Pickle's switch track and loaded them, and then the railroad engines hauled the loaded cars away to their destination. The plaintiff, Roddy, was an employee of Pickle, and, while attempting to move a car so furnished by the railroad from the branch road to the switch track, was injured in consequence of a defective brake on one of the cars. Roddy sued the railroad, and obtained a judgment for \$6,000. The railroad appealed to this court. The opinion in that case was written by the learned and lamented Macfarlane, J., and is in his

usual clear, comprehensive, and careful style. It was held in that case: First. That no contractual relation existed between Roddy and the railroad, and that the railroad owed Roddy no contractual duty, and therefore there could be no recovery based upon a breach of contract. Second. That the relation of master and servant did not exist between the railroad and Roddy, and therefore there could be no recovery growing out of any breach of duty arising from the relationship of master and servant. Third. That there is a class of cases, not arising out of any contractual relation or out of any other relationship between the parties, where recoveries are allowed, such as where the manufacturer of an imminently dangerous drug or device or instrument or poison fails to label it with a notice of its dangerous character, and a third party is injured while using it. But it was held that a railroad car, even though supplied with defective brakes, was not an imminently dangerous instrument, and therefore there could be no recovery on that ground. Fourth. That the railroad company and Pickle were engaged in "a matter of mutual interest and profit"; that the railroad knew when it furnished cars to Pickle that Pickle's servants would have to use them in discharging Pickle's part of the mutual business, and therefore "the obligation rested upon defendant to use ordinary care to provide such [cars] as would be reasonably safe for such use." It was then held that Roddy was not conclusively shown to have been guilty of such contributory negligence as cut off a recovery by him. But the judgment was reversed because the instructions given for the plaintiff were erroneous, in telling the jury that the plaintiff had a right to assume that the railroad would do its duty and furnish cars that were in a good and safe condition. Speaking of the instruction given in that case and declared to be erroneous, the learned judge said: "(6) The instruction, in directing the jury that plaintiff had the right to assume that defendant would furnish Pickle with cars properly supplied with brakes, in good repair and condition, properly declared the law, as applied to the duty a master owes to his servant. But if the servant was informed by the master, or had learned by observation or from any other source, that some of the instrumentalities furnished him were defective and dangerous, and, without promise that they would be repaired, he continued in the master's service, then the risk of injury from such defective instrumentalities would become an incident to such service, which he would assume. Price v. Railroad, 77 Mo. 508; Porter v. Railroad, 71 Mo. 66, 36 Am. Rep. 454; Devitt v. Railroad, 50 Mo. 302; Thorpe v. Railroad, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120. While the relation of master and servant did not exist between these parties, defendant owed to plaintiff the observance of reasonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing

his servant with the instrumentalities for carrying on his business. No reason can be seen why, if plaintiff knew that defective and dangerous cars were frequently left for his use, he would not assume the risk of injuries from such defects as could have been ascertained by reasonable inspection on his part. While defendant may have been negligent in the discharge of the duties it owed to plaintiff, if plaintiff neglected such precautions as common prudence demanded, under all the circumstances, he was guilty of contributory negligence, which should have defeated a recovery. In view of the fact that plaintiff himself testified that one-half the cars were without brakes, it was not proper to instruct the jury that he had the right to rely on defendant's performance of its duty in furnishing such as were properly supplied with brakes. The knowledge plaintiff had of the common neglect of defendant imposed upon him, for his own protection and safety, the duty of reasonable care in ascertaining for himself the condition of the cars before he attempted to handle them, and a failure to do so would constitute contributory negligence on his part. Whether such care was used on the occasion of his injury should have been submitted to the jury. For the errors mentioned, the judgment is reversed, and cause remanded."

The first instruction given for the plaintiff in this case is erroneous. That instruction is bottomed upon the assumption that this case is like the Roddy Case, in that the railroad and the car wheel company were engaged in "a matter of mutual interest and profit," and upon the further premise that the defendant here delivered this car to the car wheel company on its premises. This is in conformity to the plaintiff's theory that the Missouri Pacific Railroad Company only acted as the agent of the defendant in delivering the car to the car wheel company, but, as hereinbefore pointed out, the evidence does not furnish any substantial support for this position. On the contrary, this record shows that the defendant in this case was an intermediate connecting carrier, and its liability must be determined as of that character, and not, as in the Roddy Case, on the basis of two persons engaged in "a matter of mutual interest and profit." The first instruction therefore put the whole case to the jury upon an unauthorized basis, and hence that instruction is erroneous.

The second instruction told the jury that, if the plaintiff did not know that the car was not in a safe condition, he had a right to presume that the railroad had done its duty, and that the car was in such a state of repair and condition as would enable him to do his work with reasonable safety, and he had a right to rely and act upon such presumption. The instruction is an almost exact copy in this respect of the second instruction that was given for the plaintiff in the Roddy Case, and this court declared that instruction to be erroneous, and reversed the judgment for that error. This

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is an action arising *ex delicto*. The basis of the plaintiff's claim is that the defendant has been guilty of a particular act of negligence, which was the direct and proximate cause of the injury to the plaintiff, and that the plaintiff was guilty of no contributory negligence. The burden of proof is upon the plaintiff to show the negligence of the defendant, and that such negligence was the direct and proximate cause of the injury. Every person is presumed to perform his duty, but such presumption can never supply the want of proof of negligence on the part of a defendant in an action against him *ex delicto*. That presumption is indulged by the law in favor of the defendant, and not as a basis for a judgment against him. Such presumption is a part of the genius of the common law—that every man is presumed innocent until reasonably shown to be guilty. It is the underlying principle in civil cases as well as in criminal cases. It is axiomatic in the law that he who charges negligence or wrongdoing upon another, and seeks damages resulting therefrom, must prove the negligence or wrongdoing, and must connect the injury therewith. He must adduce proof, and has no right to indulge in presumptions. The same rule that presumes a defendant innocent of negligence until the contrary is shown likewise presumes the plaintiff innocent of contributory negligence until the contrary is shown. The second instruction given for the plaintiff was erroneous.

The third instruction given for the plaintiff, while not quite so glaringly erroneous as the second, nevertheless contained the same erroneous elements as to such presumptions, and was therefore also erroneous.

2. The liability of carriers to third persons, other than passengers or employees, for injuries resulting from defective appliances.

Cases like the one at bar are of comparatively recent origin, and, as is to be expected under such circumstances, the law has not been similarly declared in all jurisdictions. Until recent years, railroads were operated independently of each other. Each had its own tracks, depots, rolling stock, and appliances. Each carried the freight offered to it, as far as its line extended, and discharged at its terminus, in its own depot, by means of its own employees. Consignees got the freight from the depot, and not from the car. Under such a mode of doing business, it is apparent that no third person, other than an employee, could be injured in consequence of any defective appliance used by the railroad, and the railroad company therefore was not obliged to have any regard to any injury that might result to any third person while loading or unloading a car, for such person had nothing to do with either. The demands of commerce then required that the bulk of the freight should not be broken in transit, and the railroads were forced to arrange for through shipments, without breaking bulk from the point of shipment

to the point of ultimate destination. This compelled the railroads to connect their lines, so that the same car into which the freight was loaded at the initial point of shipment should carry it to its ultimate destination. This necessitated the issuing of through bills of lading, and of collecting generally from the consignee, the whole freight by the ultimate carrier, and the distribution by it to each road that hauled the freight of its proportionate share of the freight charges. The statutes of this state have practically made such through shipments obligatory, for section 1139, Rev. St. 1899, makes it unlawful for common carriers to enter into any combination, contract, or agreement, by change of schedule, breakage of bulk, etc., to prevent "the carriage of freights from being continuous from the place of shipment to the place of destination in this state," etc. Formerly all freight was delivered by the shipper to the carrier at its depot, and was loaded on the car by the carrier's servants. Now the statutes of this state (sections 1113, 1119, Rev. St. 1899) permit switches to be constructed to grain elevators or warehouses, coal, lead, iron, zinc, or any other ore, mines, sawmills, and any other industry, by the owners thereof, and compel the railroads to permit such switches to be connected with the railroad tracks. And section 1114 requires all consignments of grain to be delivered at such elevators or warehouses, unless the destination is changed by the consignee or consignor. And sections 1119 and 1120 require the railroads to furnish the switch stands, frogs, and other necessary materials for making connection between such switches to mines and the tracks of the railroad, and to operate such switch tracks, and, upon demand, to furnish sufficient cars to such mine owners at such mine for the transaction of the business, and, in the event the railroad fails so to do, permits such mine owners to furnish cars, and requires the railroad to switch and haul such cars without discrimination between cars owned by the railroad or by any other person.

In this state of the law, it cannot now be fairly said that when a railroad furnishes cars to a shipper, to be loaded by the shipper's servants, and to be hauled by the railroad, or when the railroad delivers loaded cars to a consignee upon the consignee's switch, to be unloaded by the consignee's servants, the railroad and the shipper or consignee were engaged in "a matter of mutual interest and profit," and for this reason the railroad is liable to the servants of the shipper or consignee for injuries received in consequence of defective appliances. For, under the law in this state, the railroad is bound to permit the construction of switches from its tracks to large business establishments, and is bound to operate such switches, and to deliver car-load shipments in bulk to, and receive car-load shipments in bulk from, such establishments. The liability of a railroad to the servants of shippers or consignees for injuries received by reason of defective appliances does

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not, therefore, rest upon the convention, agreement, or contract of the parties, nor upon the mutual interest or profit of the parties, but such liability is gauged and regulated by the general principles of law applicable to negligence. In other words, a railroad is liable to any one for injuries that are inflicted by its negligence. It owes a duty to mankind to so conduct its own business as not to be guilty of negligence that results in injury to third persons who are themselves without fault, and who are injured while in the pursuit of their lawful business. This is the basis, the reason, and the extent of its liability. Under this rule, when a railroad loads cars with freight to be delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such a state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. So, when a railroad furnishes a car to be loaded by the servants of the shipper, it is charged with the duty to exercise ordinary care to see that the car is in such a state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of loading it. And when a car is loaded for a through shipment, and must pass over one or more connecting roads before it finally comes into the possession of the ultimate carrier for delivery to the consignee, it is the duty of the ultimate carrier, before delivering it, to examine it and ascertain whether it is in such a state of repair that the servants of the consignee, while exercising reasonable care themselves, can enter upon it with reasonable safety for the purpose of unloading it; and, if it is not in such a condition, it is the duty of the railroad to make the necessary repairs, or to notify the consignee of the unsafe condition of the car, so that the consignee can warn his servants before they enter upon it. Therefore, in the case just instanced, the initial carrier is liable because it was negligent in selecting an unsafe and improper car upon which to load the freight; and the ultimate carrier is liable because it was negligent in delivering an unsafe car to the consignee, knowing that the servants of the consignee would enter upon it to unload it. Of course, the initial carrier would not be liable for defects that occurred after the car was selected and after it left its possession, if the car was reasonably safe when it was loaded and when it passed beyond its control.

This leaves for consideration the liability of an intermediate carrier, who did not select the car, and who is obliged, under the law, to receive it and haul it as far as its road runs, and there deliver it to another intermediate carrier or to the ultimate carrier; and this, too, without regard to whether the car belonged to such intermediate carrier or to some other road or person, for in all

such cases the ownership of the car is immaterial, and the carrier's liability is governed by the same rules, whether it owned the defective car or not. It is manifest that an intermediate carrier has no power of selection, and therefore cannot be guilty of negligence in loading the freight upon an unsafe or defective car. An intermediate carrier is not charged with notice that any particular car is to be delivered at the premises or upon the switch of the consignee, or that the consignee's servants will unload it. So far as the intermediate carrier is concerned, it might be that the cars would be unloaded by the servants of the ultimate carrier at its depot. No person except the servants of the intermediate carrier would have any lawful right to enter upon the car while it was in its possession. Therefore it is no part of the duty of an intermediate carrier to examine a car to see whether it is in a safe condition for any one to enter upon it for the purpose of unloading it when it reaches its destination, nor, if it discovers that it is not in such a safe condition, to repair it or to set it out, or to change the load to another and a safe car; nor can an intermediate carrier refuse to receive a car from a connecting line for any such reason. The duty and the right of an intermediate carrier is to examine the car to see whether it is in a reasonably safe condition to be hauled by it to its terminus, and there to be in such a condition that its connecting intermediate or ultimate carrier would be bound to receive it for transportation from such intermediate carrier. This is the extent of the liability and duty of an intermediate carrier. The defendant in this case is an intermediate carrier. No negligence of the intermediate carrier is shown, or in the nature of this case can be shown, and therefore the plaintiff made out no case whatever against the defendant, and the demurrer to the evidence should have been sustained; and hence the judgment is without foundation in law, and must be reversed.

This is a case of first impression in this court, but the industry and research of counsel have furnished the court with many cases, both English and American, which, it is claimed on the one side and denied on the other, are decisive of this case. A review or analysis of those cases is not deemed necessary or profitable, for they cannot be reconciled, and are made to depend upon so many different theories that it would serve no good purpose to discuss them. It is therefore deemed best to leave the study of those cases to the inquisitive or philosophical minds, and to formulate in as simple and brief a manner as possible the rules applicable to the liability of initial, intermediate, and ultimate carriers to third persons, other than passengers or employees, for injuries resulting from defective appliances, that will be enforced hereafter in this jurisdiction.

It follows that the circuit court held the only party liable in

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this case that had been guilty of no negligence whatever, and therefore its judgment must be reversed. And inasmuch as the plaintiff could not, upon a trial anew, make out any case against this defendant, the cause will not be remanded. All concur.

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(*Supreme Court of Arkansas, Oct. 31, 1903.*)

[76 S. W. Rep. 1058.]

Appeal—Review.

Where the only issue was a question of fact, a finding by the jury that a railway company was liable for articles lost in shipment over its road will not be disturbed.

Injury to Freight—Delay.*

A railway company is not liable for injuries to goods from a delay in shipment which is not unusual, where it had no notice of the urgency of the shipment.

Appeal from Circuit Court, Monroe County; George W. Chapline, Judge.

Action by J. W. Walker against the Choctaw & Memphis Railway Company and others. From a judgment allowing a part of plaintiff's claim, plaintiff and the defendant Choctaw & Memphis Railway Company appeal. Affirmed.

J. W. McCloud and E. B. Pierce, for appellants.

H. A. & J. R. Packer, for appellee.

*As to what delays will render a carrier liable for loss or injury to freight, see *Burnham v. Alabama & V. Ry. Co.* (Miss.), 6 R. R. R. 17, 29 Am. & Eng. R. Cas., N. S., 17 (verdict properly directed for defendant in action for damages to perishable fruit from delay caused by flood); *Farmers' Loan & Trust Co. v. Northern Pac. Co.* (N. Y.), 1 R. R. R. 562, 24 Am. & Eng. R. Cas., N. S., 562 (liability for delay where freight was held as contraband of war); *Merz v. Chicago & N. W. Ry. Co.* (Minn.), 2 R. R. R. 931, 25 Am. & Eng. R. Cas., N. S., 931 (right to delay shipment to investigate claims of ownership); *Sloop v. Wabash R. Co.* (Mo.), 2 R. R. R. 937, 25 Am. & Eng. R. Cas., N. S., 937 (question for jury whether delay was negligent); note, 1 R. R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134; 10 Am. & Eng. R. Cas., N. S., 87; 7 Am. & Eng. R. Cas., N. S., 573 (deviation); 21 Am. & Eng. R. Cas., N. S., 501 (freight seized under legal process); *Comer v. Stewart* (Ga.), 4 Am. & Eng. R. Cas., N. S., 263; *Gulf, Colorado, etc., R. Co. v. Hughes* (Tex.), 2 Am. & Eng. R. Cas., N. S., 507; *San Antonio & A. Pass. R. Co. v. Pratt* (Tex.), 2 Am. & Eng. R. Cas., N. S., 505; *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.* (Kan.), 10 Am. & Eng. R. Cas., N. S., 368; *St. Louis, I. M. & S. Ry. Co. v. Edwards* (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 402 (liability of connecting carrier); *Thomas v. Lancaster Mills of Clinton* (C. C. A.), 2 Am. & Eng. R. Cas., N. S., 662; *Bradley v. Chicago M. & St. P. Ry. Co.* (Wis.), 5 Am. & Eng. R. Cas., N. S., 40; *Louisville & N. R. Co. v. Farmers' & Drovers' Live Stock Commission Firm* (Ky.), 17 Am. & Eng. R. Cas., N. S., 284 (liability of initial carrier); *Brown & Haywood Co. v. Pennsylvania Co.* (Minn.), 2 Am. & Eng. R. Cas., N. S., 640 (liability of initial carrier for diverting goods from designated route); *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 7 R. R. R. 852, 30 Am. & Eng. R. Cas., N. S., 852 (liability for delay in clearing ship of connecting carrier).

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BUNN, C. J. This was a suit in the Monroe circuit court by the appellee, J. W. Walker, against the Choctaw & Memphis, the Choctaw, Oklahoma & Gulf, and the St. Louis Southwestern Railroad Companies, for damages, alleged to have been occasioned in the loss of certain articles of gin machinery in transitu. After hearing the evidence and argument of counsel, the court ordered judgment to be entered in favor of the defendant the Choctaw, Oklahoma & Gulf Railroad Company, and in their verdict the jury found against the Choctaw & Memphis Railroad Company, and judgment was rendered accordingly; and also the court directed judgment in favor of the St. Louis Southwestern Railroad Company. The defendant the Choctaw & Memphis Railroad Company, as also the plaintiff, filed their motion for new trial, which being overruled, both appeal to this court.

The evidence showed that the Choctaw, Oklahoma & Gulf Railroad Company was the successor of the Choctaw & Memphis Railroad Company in the ownership and operation of the road from Memphis, Tenn., to Brinkley, Ark., over which said articles are alleged to have been billed to be shipped, and succeeded thereto after the alleged shipments were made. The case as to the Choctaw, Oklahoma & Gulf Railroad Company was consequently dismissed, or, rather, judgment entered in its favor. The presumption of liability against the last carrier appears to have been overturned successfully by the St. Louis Southwestern Railroad Company. The jury found against the Choctaw & Memphis Railroad Company only, and the court thereupon entered judgment for the St. Louis Southwestern Railroad Company. The court rendered judgment against the Choctaw & Memphis Railroad Company, in accordance with the verdict, for the sum of \$176.05, and the plaintiff and the Choctaw & Memphis Railroad Company appealed, as aforesaid.

There appears to have been some controversy as to whether or not the missing articles had not been substituted by mistake by other articles that had no connection with the order of shipment, but we infer that the trial court, in effect, held that the evidence was insufficient to make this an issue in the case, as it refused an instruction asked directly upon that point. This evidence appears mainly to have consisted of the discrepancy between the bill of lading first copied in the record and another brought forward on certiorari, as to pencil marks indicating the articles. These substituted articles were not found, as it appears, when the car containing this shipment was unloaded at Clarendon, Ark., by the appellee in the presence of the agent of the last carrier—the St. Louis Southwestern Company. The controversy, in this way, was narrowed down as one between the plaintiff and the defendant the Choctaw & Memphis Railroad Company; and the question of fact (there being no material errors in the instruction) is whether or not the said defendant is liable for said lost ar-

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ticles. There is evidence to the effect that the entire list of articles covered by the bill of lading was shipped from Prattsville, Ala., on board the Louisville & Nashville car, to Memphis, Tenn.; and the receipt from the Choctaw & Memphis (whose servants and employees alone transferred the shipped articles from the car of the Louisville & Nashville Railroad to a similar car of its own) to the latter covered the same items of freight as the bill of lading aforesaid. The question of fact was addressed to the jury, and their verdict was for the plaintiff and against the Choctaw & Memphis Railroad Company. Under the circumstances, we can do nothing but affirm the judgment.

The question of damages for the delay in delivering the articles must be decided in favor of the defendant, as it is not shown that the defendants had any notice of the urgency of the shipment, or that unusual expedition in transporting was necessary to save loss. There was no unusual delay in the shipment in this case.

Affirmed.

NEW ORLEANS & N. E. R. Co. v. A. H. GEORGE & Co.

(Supreme Court of Mississippi, Nov. 16, 1903.)

[35 So. Rep. 193.]

Carriage of Freight—Rules—Demurrage Charges.*

Rules of a carrier imposing reasonable demurrage charges on consignee for delay in unloading cars are enforceable.

Same—Liens—Demurrage.

Code 1892, § 2108, giving a lien for freight and storage, coupled with a power to sell therefor, applies to demurrage charges for delay in unloading cars.

Same—Demurrage Charges—Notice to Consignee.

The consignee being advised of the arrival of cars for him, formal notice is not necessary to make him liable for demurrage.

Same—Same—Delivery.

Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding is full, the road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding.

Same—Same—Discrimination.

A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds.

*See foot-note appended to *Pennsylvania R. Co. v. Midvale Steel Co.* (Pa.), 1 R. R. R. 777, 24 Am. & Eng. R. Cas., N. S., 777; extensive note, 20 Am. & Eng. R. Cas., N. S., 454 et seq.; *Swan v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 446; *Kentucky Wagon Mfg. Co. v. Ohio & Mississippi Railroad Co.* (Ky.), 2 Am. & Eng. R. Cas., N. S., 722; *Galveston, Harrisburg, etc., R. Co. v. Hunt* (Tex.), 2 Am. & Eng. R. Cas., N. S., 731.

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Same—Same.

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against it separately, but enough may be retained to satisfy the charge against all.

Appeal from Circuit Court, Lauderdale County; G. Q. Hall, Judge.

“To be officially reported.”

Replevin by A. H. George, doing business as A. H. George & Co., against the New Orleans & Northeastern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

On the 3d of February, 1902, A. H. George, doing business as A. H. George & Co., instituted this suit in replevin against the New Orleans & Northeastern Railroad Company for 86 tons of cotton seed hulls contained in five box cars in the possession of defendant company; charging that the same were wrongfully detained by the railroad company. Upon the trial the railroad company contended that plaintiff was not entitled to the possession of the hulls, because of failure on his part to pay certain demurrage charges which the railroad company was entitled to under certain rules of the Alabama Car Service Association and the Mississippi Railroad Commission. The rules referred to are as follows:

Alabama Car Service Association.

“Rule 1. Per Diem Charges. All property shipped in car-load lots shall be subject to car service and trackage charges in accordance with the following regulations: A charge of one dollar per car per day or fraction thereof shall be made for the delay of cars and the use of tracks within the following described territory, after forty-eight hours from arrival thereat, not including Sundays or legal holidays.

“Rule 2. Rules for Reckoning Time. On cars arriving during the forenoon after 7 a. m., and held for orders from consignees, car service will be charged after the expiration of forty-eight hours from twelve m. of that day, and on cars arriving after 12 m. to and including 7 a. m. of the following day, car service charges will commence forty-eight hours from 7 a. m. of the following day, provided notification has been given during the day previous to this time. Should notification not be given within the time, car service will commence forty-eight hours from the hour of notification. On cars consigned to team tracks, and which may be so delivered on advance or standing order from consignee, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated.

“Rule 3. Cars for Delivery on Team Tracks, and Private Sidings. Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the track designated immediately upon arrival, or as soon thereafter as the ordinary routine of yardwork will permit. (a) The time consumed in placing such cars, or in switching cars for which

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directions are given by consignees, after arrival, shall not be included when computing detention. (b) The delivery of cars consigned to or ordered to sidings, used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted. (c) No cars shall be held from delivery in any manner, provided it is possible to secure their delivery, and the manager is charged with the duty of seeing that the purposes for which this association is formed are not evaded by the action of any railroad company. (d) On deliveries to sidings, used exclusively by certain firms or individuals located on said sidings, and where consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the sidings where such parties are located, notifying them that deliveries will only be made to them on the public delivery tracks of the company after the payment of freight charges at his office, and will promptly notify the manager of the action taken."

"Rule 9. Collections. Agents will collect car service charges accruing under the rules of the association with the same regularity and promptness as other transportation charges, and the manager is charged with the duty of seeing that these rules are enforced without discrimination. (a) It is the duty of the agent to demand car service on all cars before delivering them, where service has accrued between notification and ordering. It is also the duty of an agent, where he has any doubt about service being paid, to demand one dollar car service at the end of the free time allowed for unloading cars; and, if said car service is refused, to decline to deliver the car and to allow the lading to be taken from it, either by sealing the car, locking the car, or placing it where it is not accessible to assignee. (b) All collections for car service charges shall belong to the road upon whose tracks the cars are detained. (c) Railroads shall not discriminate between persons in car service charges. If a railroad company collects car service from one person, under the car service rules, it must collect of all who are liable."

"Rule 12. Storage. No railroad company, member of this association, shall provide free storage in its freight warehouse of contents of loaded cars subject to car service charges, but any railroad company may unload cars subject to car service charges into its own warehouse or into public or private warehouses subject to the following rules and regulations: * * *

Mississippi Railroad Commission.

"Rule 1. Railroad Companies to give Prompt Notice of Arrival of Goods. Railroad companies shall give prompt notice, by mail or otherwise, to consignee of arrival of goods, together with weight and amount of freight charges due

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thereon; and, when goods or freight of any kind in car-load quantities arrive, said notice must contain letters or initials of the car, number of the car, net weight and the amount of freight charges due on the same. Storage and demurrage charges may be assessed if the goods are not removed in conformity with the following rules and regulations. No storage or demurrage charges, however, shall in any case be allowed, unless legal notice of the arrival of the goods has been given to the owner or consignee thereof by the railroad company.

"Rule 2. Definition of Legal Notice. Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at seven o'clock a. m. on the day after such notice has been given."

"Rule 4. Demurrage on Loaded Cars—How Assessable. Loaded cars, which by consent and agreement between the railroad and consignee, are to be unloaded by consignee, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. of the day following the day legal notice of the arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day or fraction of a day that said car or cars remain loaded in the possession of the railroad company; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage; that when the period of such demurrage charges commences they are to be placed accessible to the consignee for unloading purposes on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby: provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two (72) hours."

Plaintiff was engaged in the wholesale grain and feed business in the city of Meridian. He handled large numbers of cars of hulls, feed stuff, grain, and other commodities requiring track delivery. Some of these cars were unloaded at Meridian, and some rebilled to other points. For convenience in unloading and handling freight, George had leased a portion of a warehouse which was located on a spur track known as the "Compress Track," the larger part of which was used

by the Cotton Compress Company and other concerns; and, as their warehouses were situated further up the spur track, all of the cars used by them had to pass over that portion of the track to the use of which George was entitled, thus necessitating the reswitching and replacing of his cars; but the lease to George was made with full knowledge on his part of this condition of affairs. George's warehouse only had trackage for four cars. It was the usual course of dealing between George and the railroad company that the cars were to be set into his side track on arrival, without special demand, and the representatives of the Alabama Car Service Association would check the cars on the track each day to see that there was no unnecessary delay in the switching and placing of the cars. The New Orleans & Northeastern Railroad Company also had an employee who was charged with the duty of checking all cars on the track, and this double checking was recorded in books kept for that purpose, and the result is compared to guard against errors. On Saturday, December 7, 1901, a train of 12 cars loaded with cotton seed hulls, loose in bulk, reached Meridian, consigned to A. H. George & Co. On arrival this train was placed on the storage track, appellant contending that was necessary on account of the crowded condition of the compress track. On Monday, the 9th, the compress track being still crowded with cars, the train was switched to the waterworks track. It was shown that at this date the railroad business at Meridian was extremely large. Every track was in constant use. Every car was needed for the transportation of cotton and other freight. On the same day notice of the arrival of this freight was sent to George, but he declined to receive the freight bills, claiming an overcharge. George denied that the freight bills were tendered to him, but he paid the freight charges on the 12 cars of hulls on the 13th inst., and either that day, or a few days thereafter, had the overcharge corrected. George knew of the rules of the Alabama Car Service Association, was familiar with the provisions regarding demurrage, had paid some demurrage and had refused to pay some, and at this date had a dispute or litigation pending about another matter of demurrage. None of the cars composing the train were placed in front of the warehouse of George. The Car Service Association's representative and the railroad company's car checker both testified that at no part of the "free time" after the arrival of this train did George have less than four cars on his side track, and an inspection of their original books corroborates this. George was notified during the free time that demurrage could accrue, and shortly after the free time expired he was again advised of this claim, and then and there denied his liability, denied the right of the railroad company to claim demurrage, and refused to pay. The manager of the Car Service Association instructed the railroad company not to deliver the cars until the demurrage was paid. So matters

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stood until about 1st of February, 1902, when the railroad company released 6 of the cars to George, and notified him of its intention to sell the contents of the remaining 6 for the demurrage on the 12. Thereupon this suit was filed for the contents of 5, the hulls in the other proving worthless. At the conclusion of the testimony the court refused a peremptory instruction for the defendant, and submitted the case to the jury under instructions for both sides. The jury found for plaintiff, and the Northeastern Railroad Company appeals.

Woods, Fernell & Fernell, for appellant.

Neville & Wilbourn, for appellee.

TRULY, J. This suit involves the determination of the following questions: First, are the rules for the collection of demurrage valid? and, second, if so, how are they to be enforced?

Car service associations are formed by mutual agreement among the railroad companies operating in a stated territory. They owe their existence to the growth of the business interest of the country, the enormous increase in the bulk of through freight handled daily, and the consequent extension of the many railroad systems handling the same. With every increase in the volume of the freight brought into a section from distant markets, hauled, without unloading, over the tracks of many connecting systems of the same gauge, it became more difficult for each carrier to keep track of its own cars. As the cars of each system were handled indiscriminately by every other system, they soon drifted to every quarter, as the current of traffic ebbed or flowed, and their whereabouts were often unknown to the carrier owning them. To correct this evil, car service associations were formed, the primary object of which was to prevent loss by keeping a daily record of every car handled by each carrier, so that each system might receive compensation for the use of its rolling stock, and no unfair advantage taken by one system over another, and, further, to prevent cars standing idle at one place when needed to meet the traffic demands of another section of the country. These organizations had a beneficial effect, in preventing congestion of empty and idle cars at one point, while a "car famine" prevailed at another. But it soon became apparent that the remedy was not complete. Carriers earn money by the moving of freight. The idle car produces no revenue, and the car service associations found that, while it was possible, under its then existing rules, to keep the unloaded cars moving from place to place as necessity might require, they were without power to have the freight promptly unloaded by the consignee, thus securing the car for further service. The merchant who bought goods for sale from his shelves or through his warehouse was ordinarily anxious to receive and unload his freight, but the broker who wished to do

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a large business with limited or no warehouse facilities found it cheaper and more convenient to use the cars of the carrier for storage purposes, and thus, with no expense to himself, wait a favorable fluctuation of price, when the commodity could be disposed of to advantage, and the car unloaded or rebilled to another place without unloading. To meet this contingency, the demurrage rules in question were formulated and promulgated. It should be noted that the purpose of car service associations was not to make money. They increased the revenue of the contracting carriers only incidentally, in that, by keeping every car in active service, the earning capacity was constantly exerted, and the returns therefrom increased. But the prime object of their formation was to conserve and promote the mutual interests of the carriers and the public dealing with them, by improving the service of the traffic department, and insuring the prompt handling and speedy delivery of freight to the consignee.

It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules, so far as applicable to this controversy, in themselves are fair, and based upon that fundamental maxim of justice, "The greatest good to the greatest number." The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it, and exact justice demands equal diligence of the consignee. When freight has been transported to its destination, and the consignee legally notified of its arrival, it then becomes the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper diligence in the handling of his freight. Ample time is granted him. But they prevent the dilatory dealers, who seek to save storage or warehouse charges, from keeping the tracks blocked with idle cars; thereby impeding the carriers in the prompt handling of freight, and depriving other dealers of the use of necessary cars to haul their freight or transport the products of the country to market. Certainly no reason, founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interests of both, and of the commercial world at large. This question was never before in this court, but this view is in full accord with an almost unbroken line of decisions in other states; and, precedent aside, it is supported by justice and right. *Norfolk & W. R. Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916; *Kentucky Wagon Mfg. Co. v. O. & M. Ry. Co.*, 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326, and cases cited. They have also been approved by various state railroad commissions charged with the duty of guarding the interests of the public. It is well settled that railroad companies may make reason-

able rules and regulations, not to limit their own duty or liability, but for the convenient transaction of business between themselves and the shippers of freight over their lines.

Having reached the conclusion that the rules imposing reasonable demurrage charges upon dilatory consignees are fair, just, and enforceable, we now pass to a consideration of the manner of their enforcement. It should be borne in mind that the duty of the railroad company as a carrier of freight terminates, under the decision of our court, when, the freight having reached its destination in good order, the consignee is legally notified of its arrival. After that time the railroad holds as warehouseman and bailee for hire. But in the present case, whether appellant held as carrier, or as warehouseman and special bailee, it was, in either of these capacities, rightfully in possession, and had the right to retain that possession until its legitimate charges were paid. This is a suit in replevin, in which "right of possession" is the only question of law involved. If there was any sum due appellant, whether little or much, the verdict should have been that it retain possession.

It is earnestly insisted that the railroad company has no lien on the freight for demurrage charges, either by statute or at common law. It may be true that there is a technical distinction between the lien here claimed and the common-law lien, though the difference is more imaginary than real; but it is undoubtedly true that the warehouseman, as bailee for hire, has a lien for his reasonable charges, and this is recognized as to warehousemen by the express terms of section 2108, Code 1892, in which a lien is given for freight and storage, coupled with a power to sell in a manner therein pointed out. If a carrier has a lien for storage charges if the freight is unloaded into a warehouse, upon what principle can it be denied if, by the action of the consignee, the cars themselves become the storage houses—particularly when, as in this case, the consignee knows in advance, by his course of dealing with the carrier, that the charges will be incurred if he delays in receiving his freight? In our judgment, by necessary implication, the Code chapter on "Freight and Storage" carries with it the necessary lien to enforce the collection of all reasonable charges incident to the handling of freight. In a case of this character, involving the dealings of carrier and public, the courts will not narrowly restrict the meaning of the statute, but will rather "expand the principles of law, and fit them to the exigencies of the occasion," as was aptly phrased by that eminent jurist, Chief Justice Cooper, in discussing a similar proposition. *Telegraph Co. v. Allen*, 66 Miss. 555, 6 South. 463. Knowing the rules governing the transaction, the voluntary action of the consignee gives an implied assent to the charge and lien which those rules assert. By the sole action of the consignee, the carrier is forced to retain possession of the freight. By

operation of law, it is required to keep, store, and care for the property of another. It is, under the law, entitled to compensation for its services in this connection, and the law gives it a remedy to enforce its rights. In the case of *Wolfe v. Crawford*, 54 Miss. 514, our court, in discussing the right of a carrier as a bailee, says: "But the right of the general owner [of the freight] to be restored to the possession is dependent on the payment or tender of the freight and other charges on the goods to the carrier. For these he has a lien, which would be lost if he parted with the possession, and he cannot be compelled to make delivery until they are discharged. The general owner cannot dispossess the carrier of the goods without payment or tender of his legal demands upon them." Again: "But a bailee, until the conditions of the bailment have been accomplished, has a property in the chattels, and a possession which is exclusive, both as to the general owner and strangers. * * * His right and possession extend to the entire property; nor can the bailor, or any one claiming through him, interrupt and defeat his rights until a satisfaction of his claim, or an offer to do so. The common carrier, warehouseman, and all the class of bailees who have a beneficial interest, have a right of possession and a lien in the thing. These rights are inviolable until the acts and purposes for which they were created are performed." In *Miller v. Ga. R. Co.* (Ga.) 15 S. E. 316, after stating the general rule that a carrier had a right to collect reasonable storage, the opinion proceeds: "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in the cars, instead of being put into a warehouse." 28 Am. & Eng. Enc. of Law, 28, p. 663; *Dixon v. Central of Ga. Ry. Co.* (Ga.) 35 S. E. 369; *Barker v. Brown*, 138 Mass. 340.

There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage, and would breed a multiplicity of suits.

It is contended for appellee that, whatever may be the general rule, in the instant case the appellant should be defeated of its recovery because it failed to bring itself within the rules allowing demurrage, in this: It failed to notify consignee in the manner pointed out, and it failed to tender delivery of the freight as required by the rules of the car service association.

As to the first contention, it is enough to say that the object of the rule was reached, and the law fully complied with, when George was advised of the arrival of the 12 cars, though, if the testimony of Hall, as supported by the entries in his notice book, be true, the rule was literally complied with.

As to the second contention, there is conflict as to the fact. It is true that the cars were not in fact placed in front of

George's warehouse, but the testimony does not clearly show that it was the fault of appellant. On the contrary, the testimony of Fewell, the representative of the car service association, and of Lowry, car checker of appellant company, supported by the contemporaneous entries in their record books, if believed by the jury, show conclusively that, during all of the "free time" to which appellee was entitled under the rules, placing in front of George's warehouse was prevented by an accumulation of cars consigned to George himself. This is contradicted by Shepherd, car checker for appellee, while appellee himself testified that "there was no place to deliver them. They had our track full of cotton." With the sharp conflict of testimony on this point, clause "b" of rule 3 must be considered: "The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted." It was claimed by appellant that the cars would have been placed on siding on arrival, had the siding permitted. There is much proof that the siding was full. Whether the siding was filled with cars consigned to George or to the cotton compress, in either event appellant was excused from delivering upon the siding. If George had his full quota of cars, then he had no ground of complaint. If the siding was filled with cars for compress, it had equal right to use of siding, and appellant is not liable. The court correctly instructed the jury on this point by the fifth instruction for defendant, but also gave the second instruction for plaintiff; and, in the light of our conclusions, this was error. By this instruction the jury were told that it devolved upon defendant to prove by a preponderance of the evidence that it notified plaintiff of the arrival of the cars, and placed them on the side track adjacent to plaintiff's warehouse, or "to show circumstances of excuse or justification therefor." This was misleading. By it the determination of certain questions was submitted to the jury, whereas in fact the questions were not in dispute. The jury did not have to pass on the question of notice. George's own testimony leaves no doubt of his knowledge of the arrival of the cars. In the light of the instructions for defendant, the jury were left in doubt as to what was meant by "circumstances of excuse or justification therefor."

To sum up, the sole question of disputed fact involved in this record is: Was the siding so filled with cars consigned to George, or to others entitled to the use of the side track, as to prevent the railroad company placing the cars until after the expiration of the "free time"? If so, the railroad was entitled to the verdict. If not, George should recover. Upon this sole question is there sufficient conflict to justify

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the submission of the cause to the jury for determination?

The ingenious but fallacious argument is made that the railroad company should not be permitted to claim the fact, if fact it be, that the siding was full of cars consigned to the compress, as an "excuse or justification" (in the language of the second instruction for plaintiff) for the failure to place the cars in question, because of the unjust favoritism shown the compress company by the railroad company in not charging demurrage on cars loaded with cotton. This is not within the condemnation of the rule. Clause "c," rule 9, prohibits discrimination between persons, and says that, if the car service be collected from one person, it must be collected "of all who are liable." This is to prevent discrimination between persons handling cars loaded with the same class of freight, so that if car service is collected from one dealer handling hulls or flour or grain, or other class of freight, it must be collected from all dealers handling the same class of freight. But in the instant case, car service was collected from no car loaded with cotton or coal, no matter by whom handled, anywhere within the territory covered by the Alabama Car Service Association. It is to be seriously doubted whether, under the undisputed testimony of the assistant manager of the Alabama Car Service Association, the carriers have the authority to impose car service on the cars loaded with cotton or coal. We know of no reason why we should condemn as unlawful or unjust the exemption of cars loaded with cotton or coal from car service charges, while many reasons present themselves to commend the equity of the rule. In construing the language of said second instruction, the jury might well have inferred, when considering all the instructions together, that, even though the siding was filled with cars for George or the compress, this was no "excuse or justification" for the appellant, because no car service was collected of the compress. And this position is not maintainable.

For the error in giving the second instruction for plaintiff, above referred to, which is in itself erroneous and misleading, and is in conflict with the other instructions for both plaintiff and defendant, the case is reversed and remanded, and a new trial awarded.

As a new trial must be awarded for the error indicated, one further question presents itself for decision. Did the railroad company forfeit its claim for demurrage upon the 6 cars released by releasing them, or can it hold the remaining 6 for the charges upon the entire 12? The 12 cars in question constituted one shipment, belonging to one owner, received at the same time. Further, a different amount of demurrage was due, if any was due, upon 4 cars, from what was due upon the remaining 8. There was no way to distinguish the 4 cars from the 8, except by arbitrary selection. The cars were all loaded with the same commodity, loose, in bulk. In 28

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Am. & Eng. Enc. of Law, the rule is stated: "The lien [for storage charges] is a right to retain possession of the goods until the satisfaction of the charges imposed upon them. It is specific upon the goods stored for the particular charges for such storage, although the entire lien extends to every parcel of the goods stored at any one time." In *Schmidt v. Blood*, 24 Am. Dec. 143, it is said: "A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise intrusted to him at the same time, after a delivery of part, for the storage of the whole." And the same conclusion is reached in *Steinman v. Wilkins*, 42 Am. Dec. 254—a thoroughly well reasoned case—and fully supported by citation of numerous authorities. In *Pennsylvania Steel Co. v. Ga. R. & Banking Co.*, 94 Ga. 636, 21 S. E. 577, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment. And we think this the true and just rule, supported by reason and the more modern decisions. We are unable to see why it should be required of the carrier that it retain 12 cars loaded with the same commodity, belonging to the same owner, when the contents of a fewer number of cars is sufficient to liquidate its charges on all, especially in a case where, as in the instant case, a dispute has arisen as to the validity of the charges claimed, and the consignee is willing to receive the contents of the other cars. As quoted, the conclusion of the Supreme Court of Georgia occurs to us as being the just, sensible, and convenient rule. It avoids the sale of a large amount of freight for the collection of a trifling sum, it saves the consignee the possibility of a loss by the sacrifice of his property at a forced sale, and it gives the carrier the speedy use of its cars for the moving of other freight. We note nothing in the rules under consideration forbidding such action, and it commends itself to us as being the proper course. If the question of fact be decided in favor of appellant, that it is entitled to any demurrage in this case, the 6 cars retained by it are liable to the charges on the entire 12 constituting the shipment.

For the reasons hereinbefore stated, the case is reversed and remanded.

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(*Supreme Court of Nebraska, Nov. 5, 1903.*)

[97 N. W. Rep. 308.]

Carriage of Live Stock—Shipper Riding on Pass—Assumption of Risk—Degree of Care.*

A shipper of live stock, who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to

*As to the degree of care due a stockman riding free in charge of live stock, see note appended to *Louisville & N. R. Co. v. Bell* (Ky.), 8 Am. & Eng. R. Cas., N. S., 413; *Chicago & A. R. Co. v. Winters*

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care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock; and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained by reason of the negligence of its employees is that of a common carrier for hire.

Same—Same—Duty to Furnish Safe Passageway from Car to Station.

The caboose of a stock train was left about 30 car lengths from the station, and the defendant in error and other passengers were directed to leave the caboose and take another, which would be attached to a train to be newly made up. To reach the station, the passengers were required to walk the length of the train between the train and another track, eight feet distant from the track on which their train stood. The distance between cars or engines occupying these two adjacent tracks was four feet. While walking along the train a switch engine passed the defendant in error, going north; and about the time he reached the south end of the train the same engine, returning south, overtook and struck him: *held* that, while the company might rightfully stop its caboose at the place it did, it was bound to furnish defendant in error a safe passageway to the station, and that no duty devolved on him to be watchful for any but apparent and known danger, and he would not be negligent in failing to do so; it being the duty of the company to refrain from any act which threatened him with a danger of which he was not given warning, and time to guard against.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 3. Error to District Court, Hamilton County; Good, Judge.

Action by David C. Troyer against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Deweese and Frank H. Bishop, for plaintiff in error.
John A. Whitmore, for defendant in error.

DUFFIE, C. Troyer, the defendant in error, was injured in the freight yards of the plaintiff in error at Lincoln between 11 and 12 o'clock on the night of July 14, 1898. He left Aurora with a car load of hogs on stock train No. 48, and on its arrival at Lincoln the train stopped with the engine at or near the O street viaduct, and the rear end of the train some 30 car lengths to the north thereof. It was the custom of the railroad company to make up another train at Lincoln, taking such stock as was destined for South Omaha into the newly made train; and the stockmen were required to leave the caboose of the Aurora train, and walk between the tracks of the yard along that train to enter another caboose which would be attached to the train destined for South Omaha. On the arrival of the train in Lincoln, defendant in error and other stock shippers in the caboose were told to leave it and make their way to the depot, awaiting the making up of an-

(Ill.), 12 Am. & Eng. R. Cas., N. S., 93; note, 8 Am. & Eng. R. Cas., N. S., 420 (validity of stipulation purporting to limit carrier's liability in consideration of drover's pass); New York, C. & St. L. R. Co. v. Blumenthal (Ill.), 4 Am. & Eng. R. Cas., N. S., 174 (is a passenger); Meuer v. Chicago, Milwaukee, etc., R. Co. (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 493 (contract may exempt carrier from liability in absence of gross negligence).

other train. He left the caboose on the right-hand side of the train, and, together with other shippers and passengers who had occupied the caboose, with him, made his way along the west side of his train until he had reached the south end thereof, and from which the engine had at that time been detached. The tracks in the yard lay parallel with each other. The distance from the middle of one track to the middle of the other is 13 feet 2 inches, and between the west rail of one and the east rail of the other 8 feet. The cars and engine project over these rails 2 feet on each side, leaving a distance of 4 feet between cars standing on adjacent tracks. On his way from the caboose to the south end of the train, defendant in error met a switch engine going north on the track next west. This engine had a headlight at each end, and we may assume that at that time and afterward, at the time of his injury, the bell of the engine was ringing. One Green accompanied the defendant in error, and was just in front of him. About the time they reached the south end of the train they had some conversation about going to the lunch counter for a lunch, and, as the defendant turned to the left to cross the track on which his train stood, the switch engine, which but a few moments before had passed north, returned, and Troyer was struck by the drawbar of the engine on his left side and shoulder, and thrown some 35 or 40 feet between the rails of the track which he was about to cross. Defendant in error and Green both testified that they did not hear the approach of the engine or the ringing of the bell. The only defense made was contributory negligence on the part of the defendant in error. Judgment went in favor of defendant in error, and the railroad company has brought the record here for review.

The defendant in error was traveling on a drover's contract and pass, usually issued to shippers of stock. The law is well settled in this state, following, we think, the weight of authority elsewhere, that a shipper, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire; that he assumes such risks and inconveniences as necessarily attend upon caring for such stock, but that, so modified, the liability of the railroad company to such shipper for personal injuries sustained by him from the negligence of the company or its employees, is that of a common carrier for hire. *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84, 66 N. W. 21; *Same v. Same*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; *Missouri P. R. Co. v. Tietken*, 49 Neb. 130, 68 N. W. 336, 59 Am. St. Rep. 526. In *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747-752, 4 N. W. 1066, 1068, 69 Am. St. Rep. 741, it is said: "On the former hearing it was held that one who is being transported over a line of railroad on what has been called a 'shipper's ticket' is not a passenger in such sense as to render

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applicable to him all the rules governing the transportation of passengers on passenger trains. Such a person is charged with the care of his live stock while in transit. He must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary traveling. To the extent that such requirements interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified, and no further. The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangement and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modification, is still bound to the exercise of the highest degree of care of which human foresight is capable, and contributory negligence is a defense. The difference between such a case and the ordinary one of the passenger affects also the latter question. The duties imposed on the passenger, of riding on a freight train and caring for his stock, excuse conduct which would be grossly negligent on the part of a passenger on a passenger train." This rule, which has become the settled law of this state, disposes of the contention made by the plaintiff in error that Troyer assumed any risks not usually incident to travelers on freight trains, and such as the care of his stock in transit demanded of him. Conceding to the plaintiff the right to stop the caboose at a great distance from the station, and to require the shippers to walk between its tracks for a distance of 30 car lengths for the purpose of changing cars to pursue their journey, it was its duty to furnish a safe path along which the shippers might walk, and to see that the path was not made dangerous by the operation of its trains or engines. The shippers, on alighting from the caboose and pursuing the directions given them by the employees, had a right to rest in the belief that the company would do nothing to endanger their progress. No duty rested on them to anticipate that the company would do any act to expose them to danger, and they were required to guard only against known and apparent peril.

In *Jewett v. Klein*, 27 N. J. Eq. 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence, in that he did not, before approaching the train, look up and down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station, and before his train had come to a full stop. Referring to this case, the Supreme Court of Colorado, in *Railroad Company v. Shean*, 33 Pac. 108, 20 L. R. A. 729, said: "By the foregoing and other well-considered cases it is settled that a passenger on a railroad, while passing from the

cars to the depot, is not required to exercise that degree of care in crossing the railroad track that is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe, and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation; and this distinction is to be taken into consideration in determining the propriety of his conduct." In the case of *Pennsylvania R. Co. v. White*, 88 Pa. 333, it is said: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so."

The fact that, on turning to the left to cross the track where the train on which he arrived was standing, the draw-bar of the engine coming south on the track adjacent, and to the west, struck him on the left shoulder and the left side of his body, shows conclusively that he must at the time have been standing west of the center line between the two tracks, and within two feet of the east rail of the track on which the engine was being operated. This cannot of itself be taken as negligence such as to prevent a recovery. With a clear space of four feet only in which to walk, it is evident that the variation of more than one foot from the center of the path caused by a false step, or confusion caused by the operations going on in a yard where so much business is done, would throw him in position to be struck by a passing car or engine. Having placed him in the dangerous position, the company owed him a greater degree of vigilance than under ordinary circumstances. If Troyer had seen the approach of the engine, and knew of his dangerous position, it would be his duty to use all reasonable care and diligence in avoiding the injury; but his testimony, and that of Green, who accompanied him, is to the effect that they did not hear the approach of the engine, and, as before stated, they were under no obligations to be alert in watching for the approach of a train or engine which the company had no right to operate in such a manner as to endanger them until they had reached the station and were out of the way of danger. To say that one is negligent in not looking for danger which he has no reason to suspect, and which he knows it is the duty of the company to prevent, is to cast upon him a burden which the law does not justify. In this case there could be no negligence on the part of the defendant in error unless he knew or was given notice of the approach of the engine. That he did not has been established by the verdict of the jury, upon evidence ample to sustain such finding. If he were an employee of the company, an entirely different rule would obtain, and the cases cited by the plaintiff in error would be applicable; but, being a passenger, he had every right to suppose that the company

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would use the utmost care in seeing that no danger overtook him on his way from the caboose to the station.

We discover no error in the record, and recommend the affirmance of the judgment.

POUND, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

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(Supreme Court of Michigan, Oct. 27, 1903.)

[96 N. W. Rep. 925.]

Carriers of Passengers—Tickets—Controversy between Conductor and Passenger—Duty of Passenger.*

As between the conductor of a railway train and the passenger, it is incumbent on the latter to produce as a ticket one apparently good on its face, or pay the fare in cash, and on failing so to do he may be ejected from the train by the conductor.

Error to Circuit Court, Wayne County; Flavius L. Brooke, Judge.

Action by Carrie Brown against the Rapid Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

**Memphis St. Ry. Co. v. Graves* (Tenn.), 8 R. R. R. 505, 31 Am. & Eng. R. Cas., N. S., 505 (carrier liable for ejection of passenger offering defective transfer ticket, and unable to pay cash); *Indianapolis St. Ry. Co. v. Wilson* (Ind.), 7 R. R. R. 841, 30 Am. & Eng. R. Cas., N. S., 841 (conductor must accept reasonable explanation of passenger holding defective transfer through mistake of another conductor); foot-note appended to *Rolfs v. Atchison, etc., Ry. Co.* (Kan.), 6 R. R. R. 920, 29 Am. & Eng. R. Cas., N. S., 920 (contract on ticket signed by purchaser conclusive evidence to conductor in regard to time of its expiration); *Scofield v. Pennsylvania Co.* (C. C. A.), 2 R. R. R. 193, 25 Am. & Eng. R. Cas., N. S., 193 (passenger entitled to resume journey after exercising stop-over privilege where ticket had been improperly taken up by another conductor); notes, 4 Am. & Eng. R. Cas., N. S., 515 et seq. (ticket defective on its face); 10 Am. & Eng. R. Cas., N. S., 272 (mistakes by ticket agents and conductors); *McGhee v. Reynolds* (Ala.), 10 Am. & Eng. R. Cas., N. S., 49 (may eject where ticket void on its face); *Spink v. Louisville & N. R. Co.* (Ky.), 16 Am. & Eng. R. Cas., N. S., 86 (may eject passenger given wrong ticket by agent); *Alabama & V. Ry. Co. v. Holmes* (Miss.), 10 Am. & Eng. R. Cas., N. S., 270; *Atlanta Consol. St. R. Co. v. Keeny* (Ga.), 5 Am. & Eng. R. Cas., N. S., 305, 308; *Ellsworth v. Chicago, Burlington, etc., R. Co.* (Iowa), 2 Am. & Eng. R. Cas., N. S., 80; *Louisville & N. R. Co. v. Gaines* (Ky.), 5 Am. & Eng. R. Cas., N. S., 226 (mistakes of ticket agent); *Dixon v. New England R. R.* (Mass.), 22 Am. & Eng. R. Cas., N. S., 10 (conductor of subsequent train not bound to accept ticket where failure to secure stop-over check); *Western Maryland R. Co. v. Stocksdales* (Md.), 4 Am. & Eng. R. Cas., N. S., 510 (ticket conclusive to conductor); *Rogers v. Atlantic City R. Co.* (N. J.), 3 Am. & Eng. R. Cas., N. S., 283 (conductor not obliged to investigate where passenger tries to explain loss of ticket); *Louisville & N. R. Co. v. Breckinridge* (Ky.), 3 Am. & Eng. R. Cas., N. S., 428 (mistake of ticket agent); *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 (ticket conclusive evidence to conductor of passenger's rights).

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Fink & O'Connor, for appellant.

L. S. Trowbridge, Jr. (Gray & Gray, of counsel), for appellee.

MONTGOMERY, J. This case is a companion case to that of Samuel J. Brown v. Rapid Railway Company, 90 N. W. 290. The present plaintiff is the wife of the plaintiff in that case, and was his companion on the occasion there adverted to. It appears in this case without dispute that the plaintiff's husband purchased for her a coupon ticket, composed of eight parts, the eighth part of which was signed by the general manager. The coupons attached thereto contained the statement, "Void if detached from signature coupon." Through no fault of plaintiff or her husband, these coupons were taken up separately by defendant's conductors, and, through an error, instead of taking up one of the coupons attached, one of the conductors took up the signature coupon, leaving in the hands of the plaintiff or her husband only the coupons without the signature. These detached coupons were accepted by various conductors until the second conductor on the return trip, a Mr. Gordon, objected to receiving them. The circumstances of how the ticket came to be detached were explained to the conductor, but the conductor assured the plaintiff that the ticket was no good, and demanded the payment of the fare, and upon the plaintiff's husband refusing to pay the fares the plaintiff was removed from the car without the use of any unnecessary force. The recovery of the plaintiff was limited to the amount paid for additional fare. Plaintiff brings error.

The rule of law in this state has been settled from the decision of *Frederick v. Railway Company*, 37 Mich. 342, 26 Am. Rep. 531, that, as between the conductor of a railway train and the passenger, it is incumbent upon the passenger to produce as a ticket one which is apparently good upon its face, or pay the fare in cash, and that, failing to do this, the conductor has the right to eject the passenger from the car. Any other rule would result in unseemly contests between the passenger and conductor, and would put upon the conductor the burden of determining at his peril, by facts not evidenced by the ticket produced, whether the passenger was entitled to a ride. This determination was reaffirmed in *Mahoney v. Railway Company*, 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. Rep. 528; *Heffron v. Railway Company*, 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. Rep. 601 (in an opinion by Mr. Justice Morse, where the case of *Hufford v. Railroad Company*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859, is distinguished on the ground that in the *Hufford* Case the ticket was one purporting on its face to cover the distance to be traveled by *Hufford*). This case was again distinguished in the case of *Van Dusan v. Railway Company*, 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354, and upon the same identical ground. The rule of law can-

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not be said to be in doubt in Michigan. The cases cited from other jurisdictions do not support the broad contention necessary to maintain the plaintiff's case. The case of *Scofield v. Pennsylvania Company*, 112 Fed. 858, 50 C. C. A. 553, 56 L. R. A. 224, much relied upon by plaintiff's counsel, was a case in which it was shown that the railroad company had provided by its rules that a passenger should not be expelled from its trains without the case being first reported and passed upon by its representative, who would have an opportunity to get information and act advisedly. No such fact appears in the present case. We are not only content with the Michigan rule, but it is abundantly well shown by the cases cited in the brief of defendant's counsel that this rule is in full accord with the holding in other states.

The judgment will be affirmed, with costs. The other Justices concurred.

WESTERN SASH & DOOR CO. *v.* CHICAGO, R. I. & P. R. CO.

(Supreme Court of Missouri, Division No. 2, Nov. 17, 1903.)

[76 S. W. Rep. 998]

Carriers—Through Shipments—Limitation of Liability to Own Line—Constitutionality of Statute Prohibiting.*

Rev. St. 1889, § 944, providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any loss, damage, or injury to the property caused by its negligence or the negligence of any other carrier, when construed as depriving a carrier of the right to contract for a limitation of its liability beyond its own line, is not in conflict with Const. U. S. art. 1, § 8, authorizing Congress to regulate interstate commerce.

Same—Same—Same—Liability for Negligence of Connecting Carrier—Statute.

Goods were delivered to a carrier for shipment to a point outside of the state. Before the shipment was made, the shipper inquired of the agent of the carrier whether it carried goods to that place, and was informed that it did. The carrier issued a bill of lading which indicated the place of destination, and which recited that the carrier received the goods to be forwarded subject to the rules and conditions printed on the regular shipping bills. The place of destination was not on the carrier's line, but on the line of another carrier, with which a joint traffic arrangement existed: *held*, that the contract was for through shipment, and under Rev. St. 1889, § 944, the initial carrier was liable for the negligence of the connecting carrier causing injury to the goods, notwithstanding a stipulation in the bill of lading limiting the liability of the initial carrier to its own line.

Appeal from Circuit Court, Jackson County; Jno. W. Henry, Judge.

Action by the Western Sash & Door Company against the Chicago, Rock Island & Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Evans and W. E. Clark, for appellant.

Lathrop, Morrow, Fox & Moore, for respondent.

*See *Missouri, K. & T. R. Co. v. McCann* (U. S.), 16 Am. & Eng. R. Cas., N. S., 185.

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FOX, J. This action was commenced before a justice of the peace in Jackson county September 28, 1898, by filing the following statement:

Kansas City, Mo., July 29, 1898.

Chicago, Rock Island & P. Ry. Co. to Western Sash & Door Co., Dr.

To damages for negligently breaking a window 40x70 inches

op'g, No. 67, shipped from Kansas City, Mo., to Blackwell,

O. T., July 20, 1898 \$6 75

To freight paid on same to Blackwell.... 41

\$7 16

The case was tried in justice's court October 14, 1898, taken under advisement, and judgment rendered in favor of plaintiff on October 17, 1898, and appealed to the circuit court on October 25, 1898. On February 24, 1899, and during the January, 1899, term of the circuit court, the cause came on for trial, and, a jury being waived, was submitted to the court on following evidence and following agreed statement of facts:

"For the purpose of this trial of the above-entitled cause, the following facts may be taken as admitted by both parties hereto, reserving to each party the right to introduce at the trial such further testimony as it may desire: That the plaintiff and the defendant are corporations lawfully doing business in Kansas City, Missouri; defendant being a common carrier operating a line of railroad from said city to the town of Medford, Oklahoma Territory. That on July 20, 1898, plaintiff was the owner of one glass window, which it delivered, carefully and securely packed in a crate, to defendant, and received the bill of lading or receipt hereto attached, and marked 'Exhibit A,' which receipt refers in terms to the 'regular shipping bill,' a copy of which is also hereto attached, and marked 'Exhibit B.' That Blackwell, the destination of the window indicated by the bill of lading, is not on defendant's line of road, but that its line extends only to Medford, Oklahoma, and that defendant is in nowise interested in the line of road from Medford to Blackwell. That defendant carried the said window to Medford, Oklahoma, and there delivered it, without examination, to the Hutchinson & Southern Railroad Company, the owner of the said line of road from Medford to Blackwell. That, when plaintiff delivered the window to defendant, plaintiff did not know that Blackwell was not on defendant's line of road, nor was any question asked nor was anything said in regard thereto. That the window reached Blackwell in such a badly damaged condition that it was worthless. That the damage to said window amounted to \$7.16."

Said Exhibit A attached to said statement of facts is in words and figures following, to wit:

"R. I. Railroad, Kansas City, 7—20—1898. Received from Western Sash and Door Co. in apparent good order, property marked and described below (contents and value other-

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wise unknown) to be forwarded subject to the rules and conditions printed on the regular shipping bills now used by the company signing this receipt, said rules and conditions being accepted and agreed to by the shipper, addressed to

Florence Lbr. Co., Blackwell, O. T.

No. and Description of Articles.

1 Wd. 67 opg 40x70.

Weight.

"[Internal revenue stamp, 1 cent.]"

Also indorsed or stamped thereon with a rubber stamp the following:

"C. R. I. & P. Ry., Kansas City, Mo., 14th and Wyoming Sts. Received in apparent good order. This company will not be responsible beyond stations on this road. F. W. Segur, Agent. Jul. 21, 1898, per. E."

The contents of the regular shipping bill of appellant, referred to in Exhibit A, is substantially as stated by counsel for appellant, as follows: "A blank line for the name of station and date, followed by the words 'received from,' followed by a blank line for the insertion of the shipper's name, followed by the words 'in apparent good order by the Chicago, Rock Island & Pacific Railway Company the following described packages, marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said company, to be transported over the line of this railroad to,' followed by a line for the insertion of the name of the station at the end of defendant's line, followed by the words, 'and delivered after payment of freight charges in like good order, to the next carrier (if the same are to be forwarded beyond the lines of this company's road), to be carried to the place of destination, it being expressly agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered to such carrier, but this company guarantees that the rate of freight for the transportation of said packages from the place of shipment to,' followed by a blank line in which to insert the name of the place of the final destination of the property, followed by the words, 'shall not exceed,' followed by a blank line in which to insert the through rate. It further provides that 'this company shall not be responsible for the * * * breakage of glass,' and it is 'further especially agreed that for all loss or damage occurring in transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody the packages may actually be at the time of the happening thereof, it being understood that the Chicago, Rock Island & Pacific Railway Company assumes no other responsibility for their safe carriage or safety than may be incurred on its own road.' Then follows nearly a half page blank for marks and description of the property."

Respondent concedes that the statement by appellant is substantially correct, as far as it goes, and suggests the following: "The defendant's agent at Kansas City had authority to

make a contract for through shipment to Blackwell. The plaintiff's agent, before making the shipment, called up the defendant's station agent on the phone, and asked him whether the Rock Island carried goods to Blackwell, Oklahoma, and was told that they did; and the shipment was made by him, relying upon that statement. The evidence discloses that there was a joint traffic arrangement between the defendant and the Hutchinson & Southern, whereby freight money was divided between the two. The shipment in controversy was billed through by defendant from Kansas City to Blackwell." Upon an examination of the testimony as disclosed by the record, we find the suggestion, as made, is substantially what the testimony indicates were the facts in this case.

At the close of all the evidence, the appellant prayed the court to declare the law as follows:

"(1) The court declares the law to be that, under the pleadings and evidence in this cause, the finding and judgment must be for the defendant.

"(2) Under the receipt or bill of lading offered and read in evidence in this case, the court declares the law to be that the defendant did not contract to carry the goods in controversy to the place of destination; and if the court finds from the evidence that said property was damaged while in transit, and that such damage accrued while said property was in the possession of another independent railroad or transportation company, and after defendant had made due delivery of said property to such other railroad or transportation company, then the finding and judgment must be for defendant.

"(3) If the court finds from the evidence that the property in controversy was delivered to defendant in good condition, and that the place of destination of said property was not on defendant's line of railroad, and that another independent railroad or transportation company carried said property from Medford to Blackwell, and that it was necessary that said property be carried over said other railroad or transportation line, other than defendant's line, and that said property, when delivered at the place of destination by such other line of railroad or transportation company, was found to be damaged, then, in the absence of any evidence to the contrary, the law presumes that such damage to said property accrued while it was in the possession of such other railroad or transportation line, and that it did not accrue while said property was in the possession of defendant.

"(4) Inasmuch as the evidence shows without dispute that the property in controversy, in order to reach its destination, had to be carried from this state, where it was delivered to defendant, to its place of destination, in another state or territory, to wit, in the territory of Oklahoma, the shipment of said property was what is known as an interstate shipment, which shipments are by the Constitution of the United States

placed in the control of Congress; and the laws of this state, so far as they may attempt to make the receipt of said property, and issuing a receipt or bill of lading therefor, by defendant, bind it to respond in damage for any loss or injury to said property whilst in the possession of any connecting carrier whose line forms a part of the route over which such property had to be carried, would not apply, but the defendant would not be liable to plaintiff for any damage that might occur to said property while in the possession of such other carrier, unless defendant had contracted to be liable for such loss.

“(5) Section 944 of the Revised Statutes of 1889 is void, as being contrary to the provisions of the Constitution and laws of the United States, in so far as the said section makes, or attempts to make, a common carrier, such as defendant, receiving property in this state destined to points without this state, and beyond the lines of such carrier, liable for all loss or damage accruing to such property whilst in the possession of an independent connecting common carrier for the purpose of completing the carriage of such property; the line of such connecting carrier being wholly without this state, and such loss or damage being caused by the neglect of such connecting carrier.”

After the submission of this cause to the court, on the 6th day of March, 1899, it rendered judgment for the plaintiff. In due time and form, defendant prosecuted its appeal to the Kansas City Court of Appeals, and from that court it was certified to this court, for the reason urged that a constitutional question is involved in the final disposition of the case; hence the cause is now here for review.

The contract for shipment in this cause must speak for itself. About the only controverted question involved in this suit is the proper interpretation of section 944, Rev. St. 1889. It is earnestly insisted that the provisions of this section are inapplicable to such shipment of property as the one in dispute in this action. It is also contended that this section is contrary to and repugnant to the commerce clause of section 8, art. 1, of the Constitution of the United States, and is therefore void. As this constitutional question resulted in this court assuming jurisdiction of this case, it is appropriate that it should first be settled.

If this was the first time that this question had been presented to this court for determination, we would approach the decision of it with some doubt, but it is no longer to be regarded as a new question. The able and forcible discussion of this section when directly in judgment before the Supreme Court of the United States, as well as the Supreme Court of this state, leaves no doubt as to the well-settled views of these tribunals on this question, and must be considered as decisive of it. In *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, this court, after a careful consideration

of this statute, in a well-considered opinion, fully interpreted its force and application to shipments similar to the one before us, and upon this particular branch of the case, in respect to its constitutionality, said: "We are unable to see, as contended by defendant, that the construction we give this statute makes it repugnant to that provision of the Constitution of the United States which gives to Congress alone the power to regulate commerce among the states. The act in no way operates as a regulation of trade and business among the states. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the states, subject to congressional regulations. The statute merely prohibits a carrier who, by contract, undertakes to transport property to a point beyond its own route, from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other states." To the same effect is the case of *Dimmitt v. Railroad Co.*, 103 Mo., loc. cit. 443; *Nines v. Ry. Co.*, 107 Mo. 475, 18 S. W. 26. All doubt is removed as to the correctness of the conclusions reached on this subject by the Missouri court in the unqualified approval of the interpretation of this statute by this court in the case of *Ry. Co. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093. The opinion of this court in 133 Mo., 33 S. W., 35 L. R. A., supra, was directly in judgment before the Supreme Court of the United States in the case cited. The same reasons were urged against the force and validity of this statute. The court, after a careful discussion of the propositions involved, maintained in every particular the views expressed by the Missouri Supreme Court. Mr. Justice White, in reviewing that case, said: "It is urged, however, that even although it be conceded that the Supreme Court of Missouri has interpreted the statute in question, in an abstract sense, as not depriving a railway company of the power to limit its liability to its own line when receiving goods for interstate shipment, the court has nevertheless given the statute practical enforcement as if it meant exactly the contrary of the interpretation affixed to it. In other words, the proposition is, although the Supreme Court of Missouri has declared that the statute did not deprive a carrier of its right to limit its liability to its own line, yet it has, as a necessary consequence of its application of the statute to the bill of lading in controversy in this cause, given to the statute the very meaning which it expressly declared it had not. An examination, however, of the opinion of the Supreme Court of Missouri, demonstrates that it is not justly susceptible of the construction thus placed upon it. Analyzing the opinion of the court, it results that the

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court decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract, in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn. Considering the statute as thus interpreted by the Supreme Court of the state of Missouri, it cannot be held to be repugnant to the Constitution of the United States."

This brings us to the second and only remaining proposition involved in this dispute. Upon the facts disclosed by the record, was plaintiff entitled to recover? The correctness of this judgment must find its support by the application of the facts to the terms of the statute. We have reached the conclusion, after careful examination of the facts upon which this case was tried in the circuit court, that it is clear that the shipment of the glass window was to Blackwell, Okl., and that it was received for that purpose, and that appellant's undertaking was a shipment from Kansas City to the point of destination, as indicated by the receipt, marked "Exhibit A." Before this shipment was made, the agent of appellant was called by telephone, and the inquiry was made "whether they carried goods to Blackwell, O. T." The answer to this inquiry was that they did. The goods were shipped. Appellant received them, and executed the receipt which indicated the point of destination. There was a joint traffic arrangement between appellant and the Hutchinson & Southern Road. The local agent testified that he was authorized, by the general tariff with the Hutchinson & Southern Road, to receive freight for shipment to Blackwell and similar points; "that he thought the waybill which accompanied the goods in controversy was a through waybill to Blackwell." We repeat that this state of facts indicates very clearly that the parties understood that the contract was one for through carriage, and the construction given this contract, and the understanding of the parties at the time as to its force and effect, should and will govern this case. The statute upon which this recovery is predicated (section 944, Rev. St. 1889) provides: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation

company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company, to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained." This statute is susceptible of but one construction. It simply means what it says. It was doubtless enacted for the benefit of the shipper, to meet the conditions of traffic as is disclosed in this case. If the goods are received for through carriage, the shipper looks alone to the railroad company issuing the receipt, and the receiving company must seek his remedy for loss against the connecting carrier.

It is very earnestly insisted that this contract is limited by the reference in the receipt that the goods were to be forwarded subject to the rules and conditions printed on the regular shipping bills, and as further indicated by the stamp on the receipt executed—"This company will not be responsible beyond stations on this road." We will say in respect to this contention that it is not a proposition of first impression in this court. The purpose of this statute was to meet the exceptions embodied in a contract, as is urged in this contention, and indicated a form that is reasonable and not calculated to mislead either party as to burdens imposed. The purpose of this statute is very clearly announced, as will be observed from the quotation herein, in the case of *Ry. v. McCann*, supra. Prior to the enactment of this section, the reasons urged by appellant would be full of force, and might very properly be considered a restriction of the liability of the railroad company; but, in view of the plain and unambiguous term of the statute, this result is rendered impossible. This conclusion is made clear by the case cited, of *Ry. v. McCann*, supra, where the court says: "To assert that, because there is a liability arising from the application of the statute to the bill of lading which would not result from the bill of lading itself, therefore the statute must necessarily have been held to impose on the carrier a liability for an interstate shipment beyond its own line, is without merit. True, if there had been no statute regulating the form of the bill of lading, and we were called upon to construe the instrument, we might consider that the limitations referred to in the contract restricted the liability of the carrier to his own line. This result, however, is rendered impossible, in view of the statute, not because from its provisions a liability is imposed,

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but because of the failure of the contract to conform to the requisites of the statute." The Kansas City Court of Appeals, in Popham v. Barnard, 77 Mo. App., loc. cit. 628, 629, gives emphatic expression to its views upon the subject in dispute before us. Ellison and Gill, JJ., speaking for the court, following the opinion of Smith, J., say: "Fearing that expressions in the foregoing opinion by Judge Smith would convey the impression that, when freight is received by the carrier for shipment to a destination beyond his own line, it was necessary that he should contract to carry to the point of destination before he would be liable for negligence of a connecting carrier, we deem it prudent to state that, when the carrier receives freight for shipment to a point beyond his own line, he will be so liable, though he does not contract to carry only on his own line. Receiving freight for shipment to a point beyond his own line is prima facie an agreement to carry to that point, and it is necessary, in order to escape liability, that he should stipulate that he is only to carry on his own line. McCann v. Eddy, 133 Mo. 59 [33 S. W. 71, 35 L. R. A. 110]; Bank v. Railway, 72 Mo. App. 82; Marshall v. Railway, 74 Mo. App. 81." In Dimmitt v. Ry. Co., 103 Mo. 440, 15 S. W. 761, which was followed and approved in Nines v. Ry. Co., 107 Mo. 475, 18 S. W. 26, it was said that a contract by this railroad company limiting its liability to loss or damage occurring on its own line was equivalent to an agreement only to carry to the terminus of its own line; but it will be observed in the case of Eddy v. McCann, supra, which, after an exhaustive review of the entire question, was approved by the Supreme Court of the United States in 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093, the dictum in the Dimmitt Case, herein, was disapproved in most emphatic terms. The court said, in the McCann Case: "The dictum of the court in the Dimmitt Case to the effect that an agreement that a carrier should only be liable for loss or damage occurring on its own line is equivalent to an express contract to carry the property only to the terminus of its own line cannot be taken as the law of this case, where there is an express contract and also an agreement for nonliability. Where the original undertaking is in doubt, such an agreement might be evidence of the intention of the parties in respect thereto. This question is not involved here, and need not be decided. We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would, in effect, operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case."

In the recent case of Marshall & Michel Grain Co. v. R. Co. (decided at the last term of this court, not yet officially reported), 75 S. W. 638, Burgess, J., in an exhaustive review

of all the authorities treating of this subject, expressly and unqualifiedly approved the interpretation of this statute by this court and the Kansas City Court of Appeals, herein cited. The evident purpose of the lawmaking power, by the enactment of this section, was to simplify the contract for shipment—either, in a certain and unambiguous contract, agree to transport the property of the shipper simply over the line of the receiving line, or through carriage over connecting lines to the point of destination. The parties are left free to make their contracts in respect to this shipment. If the former is adopted, if the loss occurs on the connecting line, the shipper knows when he makes his contract to whom he must look for such loss; but if the latter is adopted, or if the transportation company receives the property for shipment to a certain point of destination beyond its line, it is equally clear, under the statute, to whom the shipper looks for compensation for any loss which may occur either over its own or the connecting line. It follows that, while the statute does not in terms, it does in effect, render unavailing, when the goods are once received by the railroad company for through shipment, any exception to the liability fixed by the statute, for nonliability for loss over the connecting line. Upon the goods being presented for shipment is the time that the burden is cast upon the transportation company to determine what risks it will assume. If the goods are received for through transportation beyond its line, the statute fixes its liability. If the goods are received and the contract for transportation ends with the line of the company, the contract will control; but the clear purpose of the statute under discussion—and that is the effect of it as interpreted by the court—is to render inoperative exceptions as to nonliability as to goods received for through carriage. In other words, railroad companies cannot have a joint traffic arrangement, and say to the shipper, "Yes; we will receive your property, and ship it to the point of destination beyond our lines, but will only be responsible for loss occurring on our own line." This statute does not deprive the parties of any legal right to make a contract, but simply indicates the form of the contract after it is made. The distinction is clearly drawn by the Supreme Court of the United States in the case cited. It says, quoting from the case of *Ry. Co. v. Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759: "The distinction between a law which forbids a contract to be made, and one which simply requires the contract, when made, to be embodied in a particular form, is as obvious as is the difference between the sum of the obligations of a contract, and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown."

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The exceptions undertaking to limit the liability of the appellant to the loss over its own line cannot avail it in this proceeding. The testimony upon which this case was tried in the circuit court indicates clearly the receipt of the property by appellant for through shipment. The burden rested upon it to have the contract conform to the requirements of the statute, and, if its responsibility was to be limited, it could only be done by limiting its liability, not to the loss occasioned occurring on its own railroad, but by a limitation of the transportation of the goods to the end of its own line, by certain and unambiguous terms, expressed in the contract. This was not done, and the judgment should be affirmed, and it is so ordered. All concur.

MYAR v. ST. LOUIS SOUTHWESTERN RY. CO.*(Supreme Court of Arkansas, Oct. 24, 1903.)*

[76 S. W. Rep. 557.]

Freight Rates—Agreement—Sufficiency of Evidence.

Plaintiff having bargained for certain cotton, the sellers shipped the same to themselves at a certain point, to be delivered to the plaintiff when the purchase money was paid. Plaintiff, before the bargain, had received from the railroad's agent at the point of shipment information as to the freight rates: *held*, on an issue between plaintiff and the railroad as to the amount they could charge for carriage of the cotton, that no agreement between the shipper and the agent had been shown.

Same—Same—Discrimination—Authority of Station Agent.*

A railroad station agent has no authority to contract with a shipper for transportation at a lower rate than that allowed to others.

Same—Appeal—Objections.

The statute provides that tariffs fixed by the railroad commission shall be kept posted up for at least five days before the same shall go into effect: *held*, that where, on an issue as to the amount of freight that could lawfully be charged by a railroad, no objection that the charge claimed by the railroad had not been posted was made on trial, and evidence that the rate claimed was allowed was received without objection, the objection that the charge had not been posted could not be raised on appeal.

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

Action by Henry W. Myar against the St. Louis Southwestern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Thornton & Thornton, for appellant.

Saml. H. West and Gaughan & Sifford, for appellee.

BATTLE, J. On the 12th of April, 1900, Henry W. Myar brought an action against the St. Louis Southwestern Rail-

*As to whether a common carrier, where the circumstances are not dissimilar, and in the absence of statute law, has a right to discriminate with respect to rates, see note, 1 R. R. R. 146, 24 Am. & Eng. R. Cas., N. S., 146.

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way Company to recover the possession of certain 196 bales of cotton, which he alleged that the defendant held without right. The defendant answered, denying the plaintiff's right of possession, and alleging as follows: "That it is entitled to the possession thereof because it then had the same in its possession as a common carrier, having shipped the same from Waldo, Arkansas, to shipper's orders, for which service it had a lien on said cotton for its freight charges amounting to \$241.64, which charges were not paid nor tendered before the institution of this suit, nor before the service of said order of delivery; nor did the plaintiff deliver up nor tender the bill of lading for said cotton, they being consigned to the shipper's order, before the institution of this suit, or the service of said writ of possession or order of delivery."

To this answer the plaintiff replied as follows: "That he denied that defendant had a lien on the cotton mentioned in the complaint for the sum of \$240.64, as a common carrier or otherwise, but alleges the truth to be that plaintiff contracted with defendant as a common carrier to transport said cotton from Waldo, Ark., to Camden, Ark., for the agreed price of \$—, to be paid defendant on the delivery of said cotton to him at Camden. That on the arrival of said cotton at Camden plaintiff tendered to said defendant in lawful money of the United States the sum of \$66.66, the same being the full amount for which defendant had agreed to transport and deliver said cotton at Camden, and demanded of defendant the delivery of the cotton, which was refused. And plaintiff here brings into court and deposits for the benefit of defendant the said sum of \$—. Plaintiff says that at the time of said demand defendant waived the delivery of the bill of lading when plaintiff offered it."

The evidence adduced at the trial of the issues in the case tended to prove substantially the following facts: The plaintiff, Henry W. Myar, on or about the 6th of April, 1900, sent his agent, L. B. Stone, to Waldo, in this state, to purchase the cotton in controversy of two men, Fincher and Askew, if he could do so upon reasonable terms. Before making any effort to purchase the cotton, Stone saw the agent of the defendant, St. Louis Southwestern Railway Company, at Waldo, and asked him what the rate of the defendant was for transporting uncompressed cotton from Waldo to Camden, a distance of about 35 or 36 miles, and was informed that it was 15 cents on the 100 pounds. He previously made the same inquiry of defendant's agent at Camden and was informed that it was 25 cents on the 100 pounds. This was done about the time he left Camden to go to Waldo to purchase the cotton. He bargained with Fincher and Askew for the cotton, but did not receive or pay for the cotton. The cotton was shipped by Fincher and Askew from Waldo to Camden, over the defendant's railway, to themselves, to be delivered to the plaintiff when the purchase money was paid.

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He afterwards paid for the cotton, and tendered to the defendant 15 cents on every 100 pounds of the weight thereof in payment of the freight thereon, and demanded possession of the same. The defendant refused to deliver, and demanded 25 cents on every 100 pounds of the cotton for transportation, and the plaintiff refused to pay it. The rate for the shipment of such cotton over defendant's railway for the distance between Waldo and Camden, as fixed by the board of railroad commission of this state, and charged by the defendant, was 25 cents on 100 pounds, which in this case amounted to \$241.64.

The court, a jury being waived, found that there was due the defendant, for the shipment of said cotton, the sum of \$261.64, and that it was entitled to the possession of the same until it was paid, and rendered judgment accordingly, and the plaintiff appealed.

Appellant insists that this judgment should be set aside, because appellee's agents at Waldo agreed to ship the cotton to Camden at the rate of 15 cents on every 100 pounds. There was no evidence of such an agreement. The agent informed Stone that appellee charged at that rate for shipping cotton from Waldo to Camden, and its agent at Camden informed him that it was 25 cents. There was no contract made with appellant by the agent at Waldo. The cotton was not shipped by him, but by Fincher and Askew. Appellee's agent at Waldo had no authority to make such a contract as appellant alleges he made. He could not lawfully discriminate in favor of one shipper by charging him for transportation at a lower rate than was allowed to others, and such did not come within the apparent scope of his authority.

Appellant contends that appellee could not lawfully collect freight at the rate of 25 cents on 100 pounds of cotton shipped, because there was no evidence that such tariff or charge had been posted, the law providing that the tariff and charge fixed by the railroad commission "shall be kept posted up for at least five days before the same shall go into effect." No such objection to the collection of 25 cents on every 100 pounds of the cotton shipped was set up in any manner in the court below. Evidence was allowed to be adduced to prove that such was the rate allowed and charged without objection. Had it been objected to, appellee might have shown that the charge made had been posted for the time required by law. He cannot set up the objection here for the first time. He has waived it, and it is unnecessary for us to say whether the objection should have been sustained if it had been interposed in time.

Judgment affirmed.

RICHMOND TRACTION CO. *v.* MARTIN'S ADM'X.*(Supreme Court of Appeals of Virginia, Dec. 9, 1903.)*

[45 S. E. Rep. 886.]

Accident on Street Railway Track—Contributory Negligence—Discovered Peril—Instructions—Modifications.

In an action against a street railroad for the death of a pedestrian, it was error for the court, after instructing, at defendant's request, that plaintiff could not recover if decedent, being intoxicated, attempted to cross defendant's track in front of an approaching car, so close that he could not move from the point on the track that he first reached before the car struck him, to add to such instruction a qualification as to discovered peril, when such qualification had previously been embodied in a charge given at plaintiff's request, as the effect of such addition was to withdraw from the jury defendant's theory of the case.

Negligence and Contributory Negligence.

Negligence contributing as an efficient cause of injury will defeat an action therefor, irrespective of the quantum of negligence of the respective parties.

Same—Proximate Cause.

As negligence, to defeat a recovery for personal injuries, must have been the proximate cause thereof, where defendant knew, or with ordinary care should have known, of plaintiff's negligence, and could have avoided the accident, but failed to do so, plaintiff can recover.

Concurrent Negligence.*

Negligence of a street railroad in running over a drunken pedestrian, and negligence of the pedestrian in stepping so close in front of the car that he could not move from the place on the track that he first reached before the car struck him, are so substantially concurrent that it is impossible to separate the conduct of the pedestrian from the injury itself, so as to permit a recovery therefor.

Error to Law and Equity Court of City of Richmond.

Action by Walter Martin's administratrix against the Richmond Traction Company. There was judgment for plaintiff, and defendant brings error. **Reversed.**

*As to the application of the doctrine of concurrent negligence, see *Labarge v. Pere Marquette R. Co.* (Mich.), 8 R. R. R. 456, 31 Am. & Eng. R. Cas., N. S., 456 (recovery for gross negligence prevented by concurrent contributory negligence); note appended to *St. Louis Nat. Stock Yards v. Godfrey* (Ill.), 7 R. R. R. 28, 30 Am. & Eng. R. Cas., N. S., 28 (railroad's liability for injury to employee of another company as affected by concurring negligence of his fellow servant); foot-note appended to *St. Louis, etc., Ry. Co. v. Robertson* (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78 (negligence of vice principal and fellow servant concurring); *Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex.), 1 R. R. R. 952, 24 Am. & Eng. R. Cas., N. S., 952 (negligence concurring with erroneous conduct induced by fear); *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624 (negligence of fellow servant concurring with negligence of master does not excuse primary negligence of master in injuring another fellow servant); *Choctaw, O. & G. R. Co. v. Holloway* (C. C. A.), 4 R. R. R. 75, 27 Am. & Eng. R. Cas., N. S., 75 (concurring negligence of third party no excuse for negligence); note, 12 Am. & Eng. R. Cas., N. S., 336; note, 12 Am. & Eng. R. Cas., N. S., 13 (right of recovery where collision occurs through concurrent negligence of carriers); *Cooper v. Georgia, etc., Ry. Co.* (S. Car.), 22 Am. & Eng. R. Cas., N. S., 667 (concurring proximate cause).

Richmond Traction Co. v. Martin's Adm'r

William L. Royal, for plaintiff in error.

Edgar Allen, Jr, and L. O. Wendenburg, for defendant in error.

WHITTLE, J. About 10 o'clock on the night of December 24, 1900, Walter Martin, whose administratrix is the defendant in error here, while in an intoxicated condition, started from the southwest corner of Seventh and Broad streets, in the city of Richmond, diagonally across Broad street, in a northwesterly direction, for the purpose of taking a mule car to go to his home, on Barton Heights. In crossing the street he had to pass over the double track of the plaintiff in error, the Richmond Traction Company. He crossed the first track in safety, but at the second track, not at a crossing, but between Sixth and Seventh streets, he was struck by, or in some manner drawn under, the front fender of a west-bound car. When discovered he was lying across the southern rail, in front of the wheel guard, and was taken out in an unconscious condition, and carried to the city almshouse, where he died the next morning.

On the night of the accident, Broad street was thronged with people, and the car was moving at an unusually slow rate of speed—so slow, indeed, that it could be stopped within a few inches—and it was stopped before the front wheels reached Martin's person. After stopping on the east side of Seventh street, the car passed over to the west side, where it was again stopped for the purpose of discharging and taking on passengers, and had proceeded only a few feet from the latter point when the accident occurred.

As to just how it happened, the evidence is conflicting. According to the testimony of some of the plaintiff's witnesses, the car had started up Broad street, and just as Martin stepped across the southern rail the fender struck him, and he fell, and it passed over him. Another witness for the plaintiff testified that the car was stationary at the time Martin attempted to cross the track a few feet in front of it, when it started off very slowly, and the collision occurred. Upon cross-examination, however, the witness stated that from where he was standing he could not discern whether Martin was between the rails, or on the outside of the southern rail, when the car started. On the other hand, the testimony of the defendant's witnesses is that Martin was attempting to board the moving car from the left side at the forward end when the accident happened. On the left side of the car, front and rear, there are closed iron gates to prevent persons from entering the vestibules on that side; the proper point of ingress and egress for passengers being the rear entrance to the vestibule, on the right side of the car. There was also evidence tending to show that the motorman at the time of the collision was looking in the direction of the southeast corner of Broad and Seventh streets, where a crowd of people had congregated, some of whom were ringing cowbells and

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exploding fire crackers. He testified that he was looking ahead on the track, but did not see Martin until after the collision.

The defendant in error recovered a verdict and judgment against the plaintiff in error in the law and equity court of the city of Richmond.

The assignment of error chiefly relied on to reverse that judgment is the refusal of the trial court to give defendant's instruction "A" in the form in which it was offered, and the modification of the instruction by the court. Instruction "A" is as follows:

"If the jury believe from the evidence that the plaintiff's decedent, on the evening when he met with the accident that resulted in his death, was intoxicated from drink, and that, being so intoxicated, he attempted to cross defendant's railway track in front of a moving car that was approaching him, so close to said car that he could not move beyond the point on the track that he first reached before the car struck him, then they are instructed that the plaintiff cannot recover in this action."

The addendum by the court is: "Unless they believe further from the evidence that the defendant, by the exercise of ordinary care, could have avoided inflicting on him the injury which resulted in his death, after the motorman saw, or by the exercise of ordinary care could have seen, the danger in which the plaintiff's decedent had placed himself, in time to have avoided the accident."

It may be remarked that the principle intended to be inculcated by the addendum to the instruction was already covered by plaintiff's second instruction.

Two theories were propounded by the evidence: (1) That at the time Martin attempted to cross the northern track of the defendant's railway the car in question was at a standstill, and was subsequently set in motion, and the collision occurred; and (2) that, while the car was already in motion, Martin stepped on the track immediately in front of it, and was struck by the fender.

It is not clear that the evidence relied on to sustain the first theory was sufficient to have warranted the court in basing an instruction upon it, because, as has been observed, the witness was unable to state positively whether the car was stationary or in motion when Martin stepped upon the track in front of it. Assuming, however, the sufficiency of the evidence on that point, the law of the case in that aspect had already been submitted to the jury. The distinct purpose of the defendant's instruction which the court modified was to present to the jury the other theory of the case. The instruction correctly expounded the law, and the evidence both of the plaintiff and defendant tended to sustain it. The effect of the ruling of the court with respect to the instruction was to withdraw from the consideration of the jury the second

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theory, however disposed they might have been to adopt it, and to direct their attention solely to the plaintiff's view of the evidence. This was plainly erroneous, and operated disastrously to the defendant.

The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called "contributory negligence."

The general rule adverted to is subject, however, to the qualification that where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. From that principle arises the well-established exception to the general rule, that if, after the defendant knew, or, in the exercise of ordinary care, ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff.

It was this principle that was invoked by the plaintiff upon the first theory of the case, and applied by the court in plaintiff's instruction and in the modified instruction of the defendant. But the second theory presented a case where the proximate and efficient cause of the accident involved the concurrent negligence of both plaintiff and defendant, unbroken by any efficient supervening cause, and to such case the exception referred to obviously has no application. Upon that theory, the act of Martin and the conduct of the motorman were so substantially concurrent that it was impossible to separate the conduct of the former from the injury itself. *Rider v. Syracuse Rapid Transit Ry. Co.* (N. Y.) 63 N. E. 836, 58 L. R. A. 125. The doctrine under discussion is fundamental and elementary, and has been expounded time and again by this and other courts, from *Davis v. Mann*, 10 Mees. & W. 545, decided in the year 1842, down to the present time.

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As observed, the error of the trial court consisted in instructing the jury on one theory of the case, and ignoring the other theory, which, if sustained, would have entitled the defendant to a verdict. For these reasons, the judgment complained of must be reversed, and the case remanded for a new trial to be had not in conflict with this opinion.

BUCHANAN, J., absent.

KRUMM v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Arkansas, Oct. 31, 1903.*)

[76 S. W. Rep. 1075.]

Carriers of Passengers—Injury—Contributory Negligence.*

One standing in the caboose of a moving freight train, which contained, in a prominent position, a warning to passengers against standing while the train was in motion, was guilty of negligence contributory to his injury, and barring a recovery therefor, though he had risen to get a drink, and was waiting for the water to be cooled.

Appeal from Circuit Court, Woodruff County; Hance N. Hullen, Judge.

Action by L. W. Krumm against St. Louis, Iron Mountain & Southern Railway Company for personal injuries. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. W. Krumm lived at Bald Knob, and owned a farm and sawmill on the railroad near Fakes Station, in Woodruff county. On September ———, 1900, he got on the caboose of the local freight train at Bald Knob to go to his place, at Fakes. When the train had gone about four miles, it stopped to unload some cinders. The point at which it stopped was between one and two miles east of the station Rio Vista. After the cinders were unloaded the train started towards Rio Vista. When it had nearly reached that point, one of the brakemen notified the conductor that the train had become uncoupled and had broken in two. The conductor ordered the brakes put on, which was done; and the brakemen endeavored also to signal the engineer, but, as he was approaching the sta-

*As to whether it is contributory negligence on the part of a passenger to stand in a moving car, see foot-note appended to *Farnon v. Boston & A. R. Co.* (Mass.), 1 R. R. R. 95, 24 Am. & Eng. R. Cas., N. S., 95; *Agulino v. New York, N. H. & H. R. Co.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 314; *Burr v. Pennsylvania R. Co.* (N. J.), 16 Am. & Eng. R. Cas., N. S., 162 (leaving seat not contributory negligence per se); *Trumbull v. Erickson* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 93 (yielding seat to infirm passenger not contributory negligence); *Consolidated Traction Co. v. Thalheimer* (N. J.), 9 Am. & Eng. R. Cas., N. S., 858 (going to door of street car in motion for purpose of being ready to alight).

Violation of carrier's rules by passenger as contributory negligence, see foot-note appended to *Cincinnati, etc., R. Co. v. Lohe* (Ohio), 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S., 447.

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tion, he failed to look back, and neither he nor the fireman saw the signal. The engineer, not knowing that a part of the train had broken loose, stopped the engine and the four cars attached to it at the depot at Rio Vista. Though the brakes had been set on the other portion of the train, the speed of that portion was not entirely checked when it arrived at the depot, and it ran into the forward part of the train, and produced a considerable collision. One of the cars had a draft timber broken, and another had a center pin broken, by the collision. None of the cars were derailed. The caboose was not injured, and no one on the train was hurt, except Krumm. He was standing up in the caboose, near the rear door; and when the cars came together the force of the collision threw him down, bruising his shoulder and hip, from which he suffered considerable pain and inconvenience, and was confined to his room for several weeks, though, in the opinion of the physician who attended him, the injuries were not permanent. He afterwards brought this action to recover \$5,000 as damages for the injury. On the trial the circuit judge directed a verdict for the defendant on the ground that the plaintiff had been guilty of negligence in standing up in the caboose while the train was in motion, and that this negligence was one of the causes of his injury. The other facts are sufficiently stated in the opinion. Plaintiff appealed.

P. R. Andrews and Campbell & Stevenson, for appellant.
Dodge & Johnson, for appellee.

RIDDICK, J. (after stating the facts). This is an action to recover damages which plaintiff alleges that he suffered on account of the negligence of the defendant company. Plaintiff was riding in the caboose of a freight train, and was thrown down and injured by the jar caused by a collision between two parts of the train which had become uncoupled. The circuit judge directed a verdict on the ground that the evidence showed conclusively that plaintiff was guilty of contributory negligence in standing up in the caboose while the train was in motion, and whether this ruling was correct is the main question in the case. It is conceded that the company had posted in the caboose a notice, plainly printed in large letters, warning passengers not to stand up while the train was in motion. Plaintiff saw this notice, but he says that he did not read it until after the accident. The notice was headed by the words, "Warning Notice, Danger," in large capital letters, and was well calculated to attract attention. If, after having seen it, plaintiff failed to read it, the fault was his. The rule was a reasonable one, for it is well known that it is not practicable to operate freight trains without occasional jars and jerks, calculated to throw down and injure careless and inexperienced persons standing in the car. This rule therefore was necessary to protect passengers on such cars

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from injury. But counsel for plaintiff contends that plaintiff, being thirsty, got up from his seat to get a drink of water, and for that reason was not guilty of negligence in being on his feet at the time of the collision. On that point plaintiff testified as follows: After they unloaded the cinders "I got back in the caboose. About that time I stopped to get a drink of water, and one of the brakemen had dipped some water out of the barrel into the cooler—they put ice in at Bald Knob—and I was waiting a few minutes for the water to cool. The train had started, and I was there a few minutes, and during that time the crash came, and threw me backwards." Further on, the examination and testimony proceeded as follows: "Q. What position were you in? A. I was standing right near the door, looking out, and the cooler was right over to my right, and I think I had my hand on the frame where the cooler was sitting. Q. Standing there, looking out, waiting for the water to cool? A. Yes, sir. Q. You stood there how long before this collision? A. As near as I could judge, we run about a mile. Q. Do you know how many minutes it took that train to run a mile? A. I reckon, two or three minutes. Q. And while standing there this collision occurred? A. Yes, sir." Now, his testimony shows that he stood up in the car from the time the train left the place where the cinders were unloaded until it reached Rio Vista, where the accident happened. The evidence in the case shows that the distance between these two points was about a mile and a half, and that it took the slow-moving freight train in starting and stopping some five or ten minutes to cover this distance. But taking the statement of plaintiff that it was only two or three minutes was true, still plaintiff was not getting or drinking water during this time. He was standing there waiting for the water to cool. There was no necessity for him to do this. He should have remained in his seat while the water was cooling. Had he done so, it is plain that he would not have been injured. His injury, then, was due in part, at least, to his own carelessness.

We are of the opinion that the circuit court was right in holding that the testimony of the plaintiff himself showed that this injury was due to his own carelessness. The judgment is therefore affirmed.

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(Circuit Court of Appeals, Eighth Circuit, October 16, 1903.)

[125 Fed. Rep. 445.]

Carriers—Regulations Governing Manner of Receiving Goods—Right to Change.*

At common law a common carrier has power to make reasonable regulations governing the manner and form in which it will receive such

*See generally, *United States v. Norfolk & W. Ry. Co.* (C. C.), 3 R. R. 19, 26 Am. & Eng. R. Cas., N. S., 19; note, 1 R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134 et seq.

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articles or commodities as it professes to carry, and also to change or modify such regulations from time to time upon reasonable notice to the public.

Same—Manner of Loading Coal.

A railroad company having a newly constructed line through a locality underlaid with coal, by permitting owners of mines to load cars with coal from wagons on its side track at two small stations for a number of months, did not give them a vested right to continue such manner of loading, nor lose its common-law right to change its regulations, and refuse longer to receive coal for shipment in such manner when the volume of its business became such that to permit the use of its station tracks for loading cars in that manner would not only interfere with the operation of its trains, and cause it loss and inconvenience, but would also, by reason of the slowness of the method, result in serious loss and inconvenience to other shippers and the public by greatly reducing the quantity of coal which the road could handle and transport below what it might if loaded by the use of modern appliances, as was the case at all other shipping points on its line.

Same—Preference in Furnishing Cars.*

A carrier which transports large quantities of coal is entitled to make regulations with respect to the manner of receiving and transporting it, so that it may be handled expeditiously, safely, and economically, without unnecessary interference with the carrier's other business; and regulations which are well designed to promote such object cannot be complained of on the ground that they operate to give a preference to one who complies with them, or as a discrimination against one who does not.

Same—Arkansas Statute.

Defendant railroad company, which had previously permitted the loading of cars with coal on its side track at a station, made a regulation by which it withdrew such permission, and it thereafter refused to furnish cars to be so loaded to plaintiff or to any other shipper. During such time, however, certain mine owners, who through agreements with the company had constructed private spur tracks to their mines, were furnished cars, some of which they loaded from wagons while standing on such spur tracks before the development of the mines and the construction of tipples for loading: *held*, that the furnishing of cars for such purpose, while refusing to furnish cars for loading on the station track to plaintiff, who had constructed no spur track, did not constitute the giving of an undue preference, either under the common law or the statute of Arkansas (Laws 1899, p. 89), prohibiting the giving of any preference in the furnishing of cars.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

For opinion below, see 118 Fed. 169.

Joseph M. Hill (James Brizzolara, on the brief), for plaintiff in error.

Edward B. Pierce (John W. McLoud, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This case was tried to a jury in the Circuit Court of the United States, for the Western District of Arkansas, and at the conclusion of all the testimony the trial court directed a verdict in favor of the defendant,

See () on page 823.

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which action on its part is said to have been erroneous, and is assigned for error. The complaint on which the case was tried contained two counts. In the first of these counts Jesse A. Harp, the plaintiff in error, alleged, in substance, the following facts: That he was the lessee of a coal mine situated very near Hartford, Ark., a station on a railroad belonging to and operated by the Choctaw, Oklahoma & Gulf Railroad Company, the defendant in error; that from September, 1900, until about February 1, 1901, he operated this mine by taking out the coal and hauling it in wagons to the Hartford station, where it was loaded from the wagons into coal cars that had been set out for that purpose on a side track by the defendant company; that during all of the period last aforesaid the defendant company held itself out to the public as a common carrier of freight, being especially engaged in the carriage of coal, and that there were four other shippers of coal at Hartford besides the plaintiff from whom it received coal for transportation in the manner last described—that is to say, by setting out cars as they were called for on a side track to be loaded from wagons; that all the coal so placed on board cars by the plaintiff at Hartford during the period aforesaid was shipped by him westward to points outside of the state of Arkansas, in Oklahoma and Texas; that he succeeded, during said period, in building up a good demand for his coal in those localities, and that in expectation of a larger demand for his product during the coal season beginning August 1, 1901, he bought 40 acres of coal land near the station at Hartford. He further averred that from and after August 1, 1901, and from that time forward, until about February 15, 1902, the defendant company refused to set out coal cars on the side track at Hartford to be loaded from wagons, as it had previously done, save that on or about October 7, 1901, it did offer to furnish cars at that station to be loaded from wagons for the shipment of coal to points in Arkansas, and that, by reason of such conduct on the part of the defendant, his trade in coal was practically destroyed during the fall of the year 1901, and that he had sustained damages in a sum exceeding \$6,000, for which he demanded judgment. The second count of the complaint was substantially like the first in all of its material allegations, except that in one paragraph thereof it was charged that other parties, who were engaged in mining and shipping coal, to wit, the Kansas & Texas Coal Company, the Prairie Creek Coal Company, and the Arkansas & McAlester Coal Company, shipped coal from the station at Hartford, and that during the period when the defendant company had refused to set out cars at Hartford for the use of the plaintiff it had supplied cars at said station for the use of such other parties, thereby giving them an unreasonable preference and advantage, to the plaintiff's damage in a sum exceeding \$6,000.

The facts developed at the trial below, concerning which

there was practically no controversy, are these: From September, 1900, to February 15, 1902, and thereafter, the Choctaw, Oklahoma & Gulf Railroad Company, the defendant in error, operated a line of railroad extending from El Reno, in the territory of Oklahoma, thence eastwardly through the territory of Oklahoma, the Indian Territory, and the state of Arkansas, to Memphis, Tenn. Coal fields existed along this line of road from South McAlester, in the Indian Territory, eastward to a point between Hartford and Mansfield, both of the latter places being in the state of Arkansas, or for a distance altogether of about 100 miles. The defendant company made a practice of hauling coal taken from the mines contiguous to its road, which belonged either to itself or to other persons and corporations, and about 60 or 70 per cent. of its traffic was of that character. When a mine owner, other than the defendant company, desired to employ the defendant to haul his coal, he made application to that effect to the company, and if, on an examination of the applicant's mine by the executive officers of the railroad, the quantity of coal therein seemed to be adequate to justify the expense, the general practice was to enter into an agreement with the mine owner whereby the latter undertook to procure the right of way and grade a track leading from the railroad to his mine, and to supply the necessary ties, the railroad, on its part, agreeing to furnish the necessary iron and to lay the track, and thereafter keep the track and roadbed in good repair. It was also the usual practice in such agreements to require the mine owner to develop his mine so that it would supply a certain number of cars of coal per day, and to equip it with tipples and screens so that coal could be conveniently and speedily loaded into cars at the mine. In the month of September, 1900, the defendant's road in the vicinity of Hartford, Ark., had been recently constructed, and the volume of traffic at that station was small. The railroad company, before building its road eastwardly into the state of Arkansas, had bought about 1,600 acres of coal land near Hartford, and had located its station at that point on a part of the tract. The coal fields in that vicinity had been only slightly developed in the month of September, 1900, but there was one coal mine called Glenn's Bank that had been opened near the station to supply the local demand for coal, and after the railroad was opened for business, and during the fall of the year 1900 and the winter of 1901, the parties controlling this mine were allowed to haul coal to the station by wagons and load it on cars that were set out upon a side track. The plaintiff at that time was also in possession of a mine near the station, and at his request, and as the traffic at the station was not large, he was accorded the same privilege of loading coal from wagons into cars standing on the house track, which privilege he continued to exercise until the spring of the year 1901, up to which time, during a period

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of seven or eight months, he had loaded altogether something over 300 cars. During the period in question the railroad company did not permit coal to be loaded from wagons into cars standing upon its side tracks at any of its stations, except at the Hartford station, and at one other station called Red Oak, in the Indian Territory, at which latter place, as it seems, the practice was pursued temporarily until a spur track could be completed to the mine, which was some distance from the railroad. The defendant gave permission to load coal from wagons at Hartford mainly, if not entirely, for the purpose of aiding in the development of the coal measures at that point, but with no intention on its part of receiving coal permanently in that way, or of permitting its station side tracks to be used continuously for the purpose of standing coal cars thereon to be loaded from wagons. Some time in the spring of the year 1901, or the early summer of that year, the plaintiff was advised, by officers of the railroad company, that the practice of setting out cars on the station side tracks to be loaded from wagons would have to be discontinued. Thereafter there were several interviews between the plaintiff and persons representing the railroad company relative to the construction of a spur track to the plaintiff's mine for his benefit and accommodation. The railroad company appears to have been willing at all times to lay such a track and to furnish the iron therefor, provided the plaintiff would secure a right of way and do the grading. The plaintiff on his part appears to have been willing at first to accept this proposition. They differed, however, as to the place where the spur track should connect with the main line of the road; the plaintiff insisting that the connecting should be made at the station house at Hartford, and the defendant objecting to a connection at that point. The negotiations looking to the construction of a spur track accordingly fell through, and on August 15, 1902, the defendant company peremptorily declined to permit cars to be further loaded from wagons at its station or house track, the reason assigned for such action being, in substance, that it was the universal practice of all railroads engaged in hauling coal to require mine owners and coal shippers to have tipples and tracks whereby coal could be speedily loaded direct from the mines, and because of the annoyance, inconvenience, and delay necessarily attendant upon the loading of coal cars from wagons at stations. The plaintiff thereafter made complaint concerning the defendant's action to the board of railroad commissioners of the state of Arkansas, and in view of threatened action by that body the defendant company on October 7, 1902, again permitted cars to be loaded at the Hartford station from wagons, provided the coal so loaded was consigned to points within the state of Arkansas. At a later date, in January, 1902, for the same reason—that is to say, because of action taken or threatened to be taken by the board of railroad commissioners for the

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state of Arkansas, and to avoid the possible assessment of heavy penalties—the order against loading from wagons at the Hartford station, as respects coal consigned to any point on the defendant's railroad, either within or without the state of Arkansas, was revoked.

The fundamental question which this state of facts presents would seem to be whether the defendant company, by setting out coal cars on its house track at Hartford, and permitting them to be loaded from wagons for a period of several months, under the circumstances above detailed, thereby obligated itself to continue that practice, and was guilty of a legal wrong when it discontinued it in August, 1901. Undoubtedly a common carrier must accept and transport all commodities that are tendered to it for carriage which it holds itself out to the world as engaged in carrying, provided a reasonable compensation for the service is also tendered. Unlike a private carrier, it is not entitled to choose its patrons or customers, but, being a quasi public servant, must serve everybody who chooses to employ it, and must treat them impartially, charging each the same rate for substantially the same service, and affording to each the same facilities for shipment. A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. It is entitled in the first instance to determine what class of commodities it will engage in carrying. Moreover, it is entitled, in the first instance, by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and providing how they shall be packed for shipments so that they may be handled and transported conveniently, safely, and expeditiously. Hutchinson on Carriers, §§ 111–113, and cases there cited. This power to make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public. It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded into the cars by the slow process of shoveling. The useless consumption of time, and the ad-

ditional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business. In the case at bar one of the witnesses testified, in substance, that, if all the coal tributary to the defendant's railroad was loaded by wagon, the mines would not produce 20 per cent. of their present output because of the impossibility of handling the output in that way. This is in itself an entirely reasonable statement, and no attempt was made by the plaintiff to disprove it; his contention being apparently that, because the defendant had permitted him to load coal from wagons for a few months, it had deliberately chosen that method of receiving coal and serving the public, and was bound perforce to continue the practice indefinitely. We are of opinion that this contention on the part of plaintiff is untenable, and should be overruled. The evidence shows without contradiction, as heretofore stated, that the practice of permitting a shipper of coal to load cars from wagons at stations obtained at no other station along the defendant's road save at Hartford and Red Oak, where the practice was tolerated temporarily, and for special reasons, with no thought of pursuing it permanently. The great bulk of coal that the defendant received and transported over its road was loaded by means of tipples into cars standing on spur tracks which had been laid to the mines, and in so far as the defendant had held itself out to the world as a common carrier of coal it can only be said to have so held itself out provided the commodity was so delivered and loaded. We entertain no doubt that the defendant had the right to abandon the method of receiving coal which it had adopted at Hartford when the conditions that led to the practice at that station had so far changed as to render its further continuance inconvenient and burdensome. Especially should this right be conceded to the defendant when we reflect that if it permitted coal to be hauled to that station in wagons, and thence loaded into cars, other mine owners along its line might and probably would assert the same privilege, thereby subjecting it to great loss and expense, besides putting the public to much inconvenience. That conditions had materially changed at the Hartford station between September, 1900, and August, 1901, admits of no controversy. It was proven at the trial, and not denied, that in the meantime the defendant had disposed of its coal land at that point; that several large mines had been opened in the immediate vicinity of that place; that the station had become a large shipping point for coal; that the volume of traffic at that place, as well as along the road generally, had largely increased during the year; that the demand for cars in August, 1901, to handle coal and other products which

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required shipment, was far greater than during the previous year; and that the public interest, as well as the interest of the carrier, demanded that there should be as little delay as possible in loading cars. Under these circumstances, we think that the defendant incurred no liability in refusing to permit its station side track to be further used for loading coal cars from wagons. Nor do we find that when the trial below ended any issue of facts as respects this point remained to be settled or decided by the jury, since all the material facts upon which the defendant's right to terminate the practice of loading cars from wagons depended were practically undisputed, and the existence or nonexistence of that right was a question of law to be determined by the court.

In the second count of his complaint, as before shown, the plaintiff sought to recover damages because, as he alleged, the defendant had given an undue and unreasonable preference to other shippers of coal at the Hartford station. The facts upon which this charge was based were likewise undisputed, and are as follows: The order prohibiting the loading of coal from wagons into cars standing on the house track extended to all shippers of coal without discrimination, and was not confined in its operation solely to the plaintiff or any one else. But while the embargo existed other mine owners who had constructed spur tracks to their mines, as well as tipples for the convenient and speedy loading of cars, were supplied with cars, and during the period in question it seems that some of the parties who had constructed private spur tracks did load some coal from wagons into cars that had been set out on such private spur tracks. This was done, however, as the evidence discloses, only to a limited extent; and for the purpose of disposing of such coal as was taken out at first in the process of opening a mine. The practice was not continued when a mine was fully opened and tipples had been located and built. The charge of giving other mine owners an undue preference is founded upon the facts aforesaid, which the evidence tended to establish, and none other. We are of opinion that they do not establish a case of undue preference within the meaning and intent of the statute of Arkansas (Laws 1899, p. 89), which declares, in substance, that it shall be unlawful for a common carrier "to make any preference in furnishing cars or motive power" for the transportation of persons or property. The idea conveyed by the word "preference" is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other or granted certain privileges or facilities that were not extended to the other. Such is not the case which the evidence discloses. The plaintiff had not provided himself with a spur track leading to his mine for the storage of cars, while other shippers had done so. He desired to make use of the defendant's side track to stand cars thereon while he loaded them by the slow process of

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hauling coal to the station in wagons and shoveling it thence into the cars. The privilege which he demanded was essentially different from that accorded to other shippers who had built spur tracks on which cars could be placed and handled by the defendant with much less inconvenience and risk than when standing on its house tracks, which it used for handling other commodities, and for switching purposes, and probably used at times for the passage of trains. We fail to see how the delivery of cars to other shippers of coal on spur tracks which they had caused to be built can be fairly said to have been a preference extended to them, or a discrimination against the plaintiff, who desired to use the defendant's house tracks. The privilege which the plaintiff demanded was not accorded to other shippers nor a substantially similar privilege. We think, therefore, that he has no just cause for complaint on this ground.

The views which we have thus far expressed are confirmed by the decision in *Oxlade v. North Eastern Railway Company*, 15 Common Bench (N. S.) 680, which is frequently cited as an authority and may be justly esteemed a leading case. The decision in that action was under the canal and traffic act of 1854 (17 & 18 Vict. c. 31), which in broad terms declared "that every railway company * * * shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic * * *; and no such company shall make or give any undue or unreasonable preference or advantage to * * * any particular person or company * * *; nor shall any such company subject any particular person or company or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It appeared that the railway company made a practice of carrying coal in very large quantities, but for convenience in handling the large amount of traffic over its road it made a practice of carrying coal for colliery owners only, from the pit's mouth to stations where such colliery owners had cells appropriated to their use for the reception and sale of their coal. The complainant was a coal merchant, and on a certain day he tendered 16 cars or trucks loaded with coal to the railway company at one of its stations, to be forwarded to three other stations on its road where the complainant had no cell or siding appropriated to his special use for the reception of his coal trucks and the sale of coal. The railway company declined to receive and haul his trucks, although they were in a fit and proper condition to pass over its road, whereupon he sought to compel the company to do so. The court held, in substance, that owing to the large amount of traffic in coal over the company's road it had an undoubted right to say that it would haul coal for colliery owners only who had acquired the requisite facilities for receiving and disposing of coal promptly on arrival at its destination, as otherwise the carrier would not have the

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necessary control over its road. The court further observed that, if the privilege demanded by the complainant was accorded to him, it would have to be accorded to all other persons, and would deprive the carrier of the benefit of an arrangement which it had devised to insure the safe and convenient operation of its road. The case in question accordingly decides, in effect, that notwithstanding the broad inhibitions contained in the English traffic act, a carrier whose business consisted in part of hauling coal in large quantities was entitled to make regulations with respect to the manner of receiving and transporting it so that it might be handled expeditiously, safely and economically without any unnecessary interference with the carrier's other business. It follows, of course, that regulations made by a carrier which have these objects in view, and are well designed to promote them, cannot be complained of on the ground that they operate as a preference in favor of who one does comply with them or as a discrimination against those who do not.

On the trial of this case in the lower court one of the questions which appears to have been discussed and decided by the learned trial judge (vide 118 Fed. 169, 172) was whether the defendant company was under an obligation to put in a switch or spur track for the plaintiff's convenience at such place as he desired. In their brief counsel for the plaintiff in error say that they will not discuss this question, because the plaintiff did not bring his action on account of any failure of the defendant company to put in a switch, but for the other alleged wrongs heretofore considered. Besides, the evidence does not show, we think, that the defendant did decline to put in a switch or spur track for the plaintiff on the same terms that it was in the habit of putting in such tracks for other shippers. This latter question, therefore, according to the concession of counsel, is not before this court for determination or consideration.

Another question, however, has been debated by counsel for both parties at some length, and that is whether the Arkansas statute, above cited, and other statutes of the state of a like nature, have any application in determining the rights of common carriers and shippers of coal as respects coal which is tendered to the carrier for shipment to points outside of the state. The plaintiff in error maintains the affirmative of this proposition, while the defendant in error maintains the negative; contending in effect, that the local law is applicable only as respects coal that is tendered for shipment to points within the state, and that if intended to apply to shipments to other states and territories would be invalid as amounting to a regulation of interstate commerce. We have found it unnecessary to consider or determine that question, holding, as we do, that the acts proven to have been committed by the defendant company were not a violation of the local law or the common law. Learned counsel for

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the plaintiff in error concedes in his argument, and in that view we concur, that it is immaterial in the case in hand "whether it be considered that the common law controls or whether the statute controls." The local statute (section 6193, Sandels & H. Dig. Ark.), which declares that railroad companies "shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junctions of other railroads, and at sidings and stopping places established for receiving and discharging * * * passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places on the due payment of tolls," etc., cannot be understood as depriving the carrier of the right to make reasonable regulations applicable alike to all persons and corporations relative to the manner in which such a commodity as coal shall be delivered for transportation, nor as compelling the carrier to set out on its side tracks at stations coal cars to be there loaded by means of wagons. That view of the statute, if it was adopted, would deprive the carrier of the power to serve the public in the most efficient, speedy, and economical manner, and it will not be presumed that such was the purpose of the Legislature. If the statute in question operates to modify the common law, it only modifies it, we think, to the extent of compelling railroads to carry all kinds of property which is tendered for carriage instead of such property as they make a public profession of carrying. It does not deprive railway companies of the right to make such reasonable regulations concerning the manner in which an article like coal shall be delivered as are conducive alike to the successful operation of its road and to the public welfare.

We are of opinion that the case was rightly decided below, and the judgment is accordingly affirmed.

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(Supreme Court of Georgia, Oct. 30, 1903.)

[45 S. E. Rep. 695.]

Passengers—Employee Riding to and from Work—Degree of Care.*

One employed by a railroad company as a telegraph lineman, and who is transported to and from his work free of charge by the railroad com-

**Simmons v. Oregon R. Co.* (Ore.), 4 R. R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896 (employee riding free, under contract, when off duty, is a passenger); *Travelers' Ins. Co. v. Austin* (Ga.), 5 R. R. R. 433, 28 Am. & Eng. R. Cas., N. S., 433 (paymaster traveling on business of his office not a passenger within meaning of accident insurance policy); note, 20 Am. & Eng. R. Cas., N. S., 121 et seq.; *Ionnone v. New York, N. H. & H. R. Co.* (R. I.), 16 Am. & Eng. R. Cas., N. S., 359 (employee riding from work); *Chattanooga Rapid Transit Co. v. Venable* (Tenn.), 19 Am. & Eng. R. Cas., N. S., 768 (employee riding to work a passen-

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pany, and who while so traveling has nothing to do with the control or operation of the train on which he is riding, is a passenger, to the extent that the company is bound to exercise extraordinary diligence to keep from injuring him.

Case at Bar.

The evidence in the present case did not demand a verdict for the defendant, and the charge of the court, which was at variance with the principle announced in the preceding headnote, will therefore require the grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Henry Carswell, Jr., by his next friend, against the Macon, Dublin & Savannah Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

John R. Cooper and M. W. Harris, for plaintiff in error.

Jno. M. Stubbs, Minter Wimberly, and Akerman & Akerman, for defendant in error.

CANDLER, J. The plaintiff below, who is also the plaintiff in error in this court, was a telegraph lineman in the employment of the defendant railroad company, and his duties consisted in "repairing, putting up, and fixing telegraph wires, and doing other such work for the defendant company." He was a member of a gang of such workmen, whom the defendant transported over its line of railroad free of charge between points on the line where their work might be needed. These workmen were carried in freight box cars, which were fitted up as "camp cars" especially for their use, and it is inferable that they ate and slept in these cars. While the plaintiff was being thus transported over the defendant's line, several cars in the train, including the one in which he was riding, were derailed and turned over, and he was injured. He brought suit against the company, charging that it was negligent, in that its employees were at the time running the train at an improper and dangerous speed; that "the wheels, track, and other appliances and machinery of the car upon which petitioner was riding was defectively constructed and out of repairs, so the wheels and cars could not safely run upon the track"; that the track was not properly graded at the point where the derailment took place; and that the employees of the defendant failed to properly inspect the wheels of the cars, "and its other appliances and machinery about the train, and its said track [and] roadbed at the point where the injury occurred." On the trial the jury found for the defendant. The plaintiff made a motion for a new trial on numerous grounds, which was overruled, and he excepted.

ger); *McNulty v. Pennsylvania R. Co.* (Pa.), 8 Am. & Eng. R. Cas., N. S., 685; *Wright v. Northampton & H. R. Co.* (N. Car.), 10 Am. & Eng. R. Cas., N. S., 151 (employees as passengers); *Whitney v. New York, etc., R. Co.* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 184 (employees riding on passes); *Louisville & N. R. Co. v. Scott* (Ky.), 17 Am. & Eng. R. Cas., N. S., 261 (servant riding gratuitously by permission of conductor is a passenger).

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1. There is nothing in the evidence to indicate, and indeed it is not claimed, that the plaintiff was at any time guilty of negligence contributing to his injuries. He was in one of the "camp cars" of the defendant company, riding from the place where he had been at work towards the city of Macon. The court charged, in effect, that the defendant was only bound to exercise ordinary diligence to prevent the plaintiff's injuries, and that, before the plaintiff could recover, it must appear that he was free from fault, and did not contribute in any way to his injuries. It is apparent from the entire charge that the trial judge regarded the case as an ordinary action by an employee of a railroad company to recover damages from his employer for injuries received while in the discharge of his duties, and that the trial was conducted throughout on this theory. This was error. It is true that at the time his injuries were received the plaintiff was an employee of the defendant company. He was not, however, in the discharge of his duties at the time. He was, in a sense, a passenger as well as an employee, and the defendant owed him the duty of extraordinary diligence to protect his safety. It is well settled that one may be both a passenger and an employee of a railroad company—"an employee when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company." 5 Am. & Eng. Enc. L. (2d Ed.) 516; Travelers' Ins. Co. v. Austin, 116 Ga. 266, 42 S. E. 522. The plaintiff comes clearly within the class of employees "who cannot possibly control those who should exercise care and diligence in the running of trains"; and it is expressly provided by Civ. Code 1895, § 2297, that railroad companies "shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence." See, also, Atlanta R. Co. v. Ayers, 53 Ga. 12; Atlanta R. Co. v. Webb, 61 Ga. 589. This case is, as to its facts, easily distinguishable from the cases of Prather v. R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263, and Travelers' Ins. Co. v. Austin, supra. In the Prather Case, the deceased, for whose homicide the action was brought, was a train hand, whose duty it was "to do anything to insure the successful working of the train." Carswell, the plaintiff in this case, was, as has been said, a telegraph line-man. He had nothing whatever to do with the operation of the train, and was on it solely for the purpose of riding from one point to another. In the Austin Case, which was an action for the double indemnity stipulated for in an accident insurance policy in the event the insured should be injured or killed while riding as a passenger on a passenger train, it appeared that the deceased was actually engaged in his duties while in transit, and that the car in which he was riding when killed was fitted up especially for his work as paymaster of

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the railroad company. Furthermore, the Austin Case did not deal in any way with the duty of diligence on the part of the railroad company to the deceased, but had to do solely with the question whether, at the time he was killed, Austin was technically a passenger, within the meaning of the contract of insurance on which the suit was brought. It is clear, therefore, that that case has no bearing one way or the other on the question now under consideration.

2. It is clear that the error pointed out in the foregoing must work a reversal of the judgment overruling the motion for a new trial, unless it appears that the verdict was demanded by the evidence; that is, that, in spite of the erroneous charge of the court, the evidence demanded a finding that the company fulfilled its duty to exercise extraordinary diligence for the safety of the plaintiff, and that any different verdict from the one returned would have been unwarranted and illegal. While the defense made by the railroad company was undeniably a strong one, and amply authorized such a finding as we have indicated, we cannot say that it demanded it. The evidence as to the cause of the derailment of the train was conflicting. The contention of the defendant was that it was caused by the breaking of the flange of a wheel on a freight car other than the one in which the plaintiff was riding, that the wheels of the freight car in question were thoroughly inspected and found to be in good condition before the car was taken out with the train, and that the breaking of the flange could not possibly have been prevented by human foresight. This contention was supported by the evidence introduced in behalf of the defendant. On the other hand, there was evidence for the plaintiff which, if believed by the jury, would have authorized them to find that the derailment of the train was not caused by the broken flange of the freight car, but that one of the cars occupied by the gang of workmen of which the plaintiff was a member was the first to leave the track; that such car had what was known as a "flat" or defective wheel; and that at the time the train ran off the track it was being run at a negligently high rate of speed; and from these facts it might well have been inferred that the plaintiff's injuries were due to the negligence of the defendant. In regard to the inspection of the wheels of the car which the defendant contended first left the track and caused the plaintiff's injuries, the conductor of the train testified that he did all that could have been done to make a thorough inspection, and that it was impossible, by the inspection made, to discover any defect in the flanges of the wheels. What he did was described by him as follows: "When I came to that car to take it on the train, I inspected it as I generally do all others. I went down one side and back the other, and examined the draught timbers and brake hangers and flanges and wheels. The light I had to examine it with was my lantern." Another witness for the defendant, however, testified:

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“You could not discover defects in the flange just by walking on the side of the car. You would have to examine it. * * * You have to look on both sides of the wheel.” In view of these conflicts in the evidence, as well as others which need not be enumerated, we conclude that a finding that the railroad company exercised extraordinary diligence to prevent the plaintiff’s injuries was not demanded, and that the charge to the jury, instructing them that the defendant was only bound to exercise ordinary care, was error of such importance as to require the grant of a new trial. The motion for a new trial contains numerous other grounds, none of which, in our opinion, disclose any substantial error on the part of the trial court. The case is sent back for another hearing solely on the ground of the erroneous charge to which we have referred.

Judgment reversed. All the Justices concur.

SOUTHERN RY. IN KENTUCKY *v.* COMMONWEALTH.

(*Court of Appeals of Kentucky, Dec. 1, 1903.*)

[77 S. W. Rep. 207.]

Freight Rates—Discrimination—Through Shipment.

Const. § 215, providing that all railway companies shall transport freight of the same class for all persons from and to the same points and upon the same conditions, in the same manner, and for the same charges, does not prohibit a railway company from charging a through rate which is less than the sum of the local rates between the two points.

Same—Same—Same.

A railroad company issued a bill of lading agreeing to transport freight to a point which was several miles from the nearest station on its line. At this station a person who had always made it a practice to carry freight between the station and the point to which the goods in question were consigned took charge of the goods, and carried them to the consignee, with whom he had a special contract as to the price to be charged for carrying such goods. Deducting this price from the through rate charged by the company, the remainder was less than the local rate from the point of shipment to the station. Const. § 215, provides that all railways shall transport freight of the same class from and to the same points for the same charges: *held* that, notwithstanding the railroad company had no express contract with the person who carried the goods from the railroad station to their destination, nevertheless it was a through shipment, for which the railroad company was entitled to charge a sum less than the sum of the local rates.

Appeal from Circuit Court, Mercer County.

“To be officially reported.”

Action by the commonwealth of Kentucky against the Southern Railway in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and E. H. Gaither, for appellant.

Hazelrigg & Chenault and J. S. Owsley, for appellee.

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HOBSON, J. The grand jury of Mercer county returned an indictment on February 6, 1902, charging that appellant, within 12 months before the finding of the indictment, transported a barrel of gasoline for Henry E. Samuels from Louisville to Harrodsburg, Ky., for the price of 26 cents per 100 pounds, and contemporaneously therewith transported between the same points a barrel of gasoline of the same class and kind of freight for Wallace Green for the price of 21 cents per 100 pounds; that this was done willfully and knowingly, with intent to discriminate in favor of Green, and against Samuels, in violation of section 215 of the Constitution of Kentucky: "All railway, transfer, belt lines, or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations, or corporations, from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment." Section 217 of the Constitution, which fixes the penalty for a violation of section 215, is as follows: "Any person, association or corporation, willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, or two hundred and sixteen, shall, upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense, five thousand dollars, and for the third offense shall thereupon, ipso facto, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, shall, ipso facto, forfeit its rights to business in this state; and the Attorney-General of the commonwealth shall forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections." The proof on the trial showed that Samuels lived at Harrodsburg, a point on appellant's line of railroad, but that Green lived at Perryville, which was 10 miles away from appellant's road. Twenty-six cents per 100 pounds were charged Samuels for the barrel of gasoline shipped to him, which was billed to him at Harrodsburg. The barrel of gasoline shipped to Green was billed to him at Perryville, and was shipped at the rate of 36 cents per 100 pounds from Louisville to Perryville. When the gasoline reached Harrodsburg, it was delivered to a man named Erwin, who ran a wagon daily from Harrodsburg through Perryville to Mitchellsburg, carrying the United States mail; also persons and property. He took the gasoline to Green, collecting the charges going to the railroad, which were 21 cents per 100 pounds, and paid the amount to the company. Green paid Erwin 50 cents for bringing the barrel over, which was 10 cents less than was coming to Erwin on the basis of 15 cents per 100 pounds. There was an arrangement between Green and Erwin that Erwin would haul gasoline over at 50 cents a barrel. This arrangement seems to have

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grown out of the fact that there is a station on the Louisville & Nashville Railroad four miles from Perryville, from which also goods were hauled to Perryville, and Erwin was underbidding to get the hauling on his route. The railroad had for a number of years a published tariff on this class of goods by which the rate was fixed to Harrodsburg at 26 cents and to Perryville at 36 cents. When the rate was first made, about the year 1889, a man named James was running the wagon line, and the rate of 15 cents for the wagon line was then agreed on between him and the railroad company. After three years he sold out to a man named Tatum, and subsequently Erwin came in under Tatum; but the railroad company had no agreement with Erwin. It simply billed the goods to Perryville as before. Erwin received them at Harrodsburg and delivered them at Perryville. The railroad company did not know that Erwin was making any reduction on the 15 cents per 100 pounds allowed for his part of the haul. The goods were not delivered to the consignees at Harrodsburg, but were required to be carried over by the wagon line and delivered at Perryville. The wagon line hauled for everybody that applied, and also carried for a time the express matter, each owner as he came in succeeding to all the rights and privileges of his predecessors. The proof leaves no doubt that the operator of the wagon line was a common carrier. *Robertson v. Kennedy*, 2 Dana, 431, 26 Am. Dec. 466; *Cayo v. Pool* (Ky.) 55 S. W. 887, 49 L. R. A. 251; *Chevallier v. Straham*, 47 Am. Dec. 639. If there had been a railroad operated by another company running from Harrodsburg through Perryville to Mitchellsburg, and the barrel of gasoline had been taken by appellant to Harrodsburg, and by the other company to Perryville, appellant receiving 21 cents per 100 pounds for carrying it, and the other company 12½ cents, it could not be maintained that this would have been a violation of section 215 of the Constitution; for it is well settled that a through rate can be made less than the sum of the local rates between the two points. Were it otherwise, all through freight would have to be hauled at the local rates. *Railroad Company v. Osborne*, 52 Fed. 912, 3 C. C. A. 347; *Tozer v. U. S.* (C. C.) 52 Fed. 918; *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S. 276, 12 Sup. Ct. 844, 36 L. Ed. 699; *Parsons v. Chicago, etc., R. R. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231. The fact that the connecting carrier took the goods on a vehicle pulled by horses and not by steam, is not relied on as changing the principle; but it is urged that Erwin had no contract with the railroad company, and that, therefore, he took the goods simply as the agent of the consignee, Green. Without considering whether a contract should be implied from the fact that he came in under James, who made the contract with the railroad company, we rest our judgment on the ground that appellant had received the goods consigned to Perry-

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ville, and had, by its bill of lading, agreed for 36 cents per 100 pounds to transport them to Perryville. This was not a shipment to Harrodsburg. There was in such a shipment and the shipment to Samuels at Harrodsburg no discrimination between shippers of the same class of freight between the same points. Appellant had the right to charge less for part of the through haul than the local rate to that point. When it received the goods and undertook to carry them to Perryville, it was its duty to see that they got to Perryville. Its obligations under such a contract were different from those under a contract to carry goods to Harrodsburg. It was a through shipment from Louisville to Perryville. Erwin came in under it, and whether there was any contract, express or implied, between it and Erwin, there was an express contract between it and the shipper that it would transport the goods from Louisville to Perryville. We are therefore of opinion that the facts shown establish no violation of the constitutional provision quoted. If there were anything in the evidence indicating an evasion of the constitutional provision by the billing of the goods to Perryville and the delivery of them at Harrodsburg to the consignee in order to discriminate between shippers, a different question would be presented. But the facts show perfect good faith, and also show that only in this way can appellant carry goods to Perryville.

Judgment reversed, and cause remanded, with directions to dismiss the indictment.

CITY OF MONTPELIER *et al.* v. BARRE & MONTPELIER TRACTION & POWER CO.

(*Supreme Court of Vermont, Nov. 25, 1903.*)

[56 Atl. Rep. 278.]

Street Railways—Consolidation—Granting Transfers.

A street railway company permitted to construct a railway in a city on condition that the fare for riding in the city be five cents, and that it give transfers, to all of its lines, took an assignment of all the rights and succeeded to all the obligations of another street railway company which had constructed a line in an adjoining city on the same condition: *held* that, having been permitted to connect the lines without any such condition, it was not required to grant transfers from the lines in one city to those in the other.

Petition of the city of Montpelier and another for mandamus to the Barre & Montpelier Traction & Power Company. Heard on petition, answer, and evidence. Petition denied.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Frederick P. Carlton, for petitioner.

Richard A. Hoar and Rufus E. Brown, for petitionee.

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HASELTON; J. This is a petition for a writ of mandamus. The petitioners are the city of Montpelier and Frank M. Corry, its mayor, who petitions on his own behalf and on behalf of all the citizens and inhabitants of the city of Montpelier. The defendant is a corporation operating lines of street railway within the cities of Barre and Montpelier and the town of Berlin. Its lines or systems have been so connected that it now operates a continuous line from the city of Montpelier through the town of Berlin to the city of Barre, and the petition is for a writ of mandamus directing the defendant to issue to its Montpelier patrons transfers to the lines of the defendant in Berlin and Barre. The testimony, however, establishes that the defendant carries a passenger over its lines in the city of Montpelier and the town of Berlin to the Barre line on payment of a single five-cent fare. The defendant was incorporated by an act of the Legislature in 1892. February 10, 1896, the city council of the city of Barre granted it the right to construct and operate a street railway over various streets of said city, and made it a condition of the grant that the fare for riding upon the lines of the company within the city limits should be five cents, and that the company should give transfer tickets to all of its own lines. At this time the defendant had no authority, under its charter, to construct or operate a street railway within the limits of Montpelier. July 8, 1896, the city council of the city of Montpelier granted to the Consolidated Lighting Company, a corporation, the right to construct and operate an electric railway over various streets in Montpelier. It was a condition of this grant that the fare for riding upon the lines of the grantee within the limits of Montpelier should be five cents, and that the grantee should give transfer tickets to all of its own lines. June 16, 1896, the selectmen of the town of Berlin granted to the Consolidated Lighting Company the right to construct and operate a street railway over certain streets in that town. It was provided that the fare within the town limits should be five cents, and that the grantee should give transfers to all of its own lines. The Consolidated Lighting Company, to which the Montpelier and Berlin grants were made as recited, had no authority to construct or operate a street railway in Barre. Afterwards, under legislative authority, and in accordance with a previous agreement, the defendant company took an assignment of the rights, privileges, and franchises of the Consolidated Lighting Company in respect to the construction and operation of lines of street railway in Montpelier and Berlin, and so succeeded by operation of law to all the obligations of the latter company in respect to fares and transfers. But these obligations were neither diminished nor augmented by the assignment. Later, the city of Montpelier granted to the defendant the right to construct and operate a line of street railway which would connect the lines hereinbefore referred

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to; and at and before the date of the bringing of this petition the defendant had in operation a line of street railway from within the city of Montpelier through the town of Berlin into the city of Barre, and also a branch line in the city of Montpelier and a branch line in the city of Barre. This last-named grant or franchise contained nothing such that by accepting and acting under it the defendant obligated itself to issue to its Montpelier patrons transfer ticket to its lines in the city of Barre, nor can we find from the evidence taken that the defendant has in any other way become so obligated. None of the rights or obligations of the defendant with respect to its road within the limits of Barre were either directly or indirectly derived from or imposed by the city of Montpelier. Neither the city of Montpelier nor its mayor nor the Montpelier patrons of the defendant's road can complain because the defendant requires of a person riding on its road within the limits of the city of Barre payment of the fare which that city permits it to charge.

No consideration is given to questions not arising upon facts found or conceded, nor to questions unnecessary to a decision of the case.

The petition is dismissed, with costs.

THOMAS v. FRANKFORT & C. RY. CO. *et al.*

(*Court of Appeals of Kentucky, Nov. 24, 1903.*)

[76 S. W. Rep. 1093.]

Connecting Carriers—Contract—Rates—Ratification.

The acceptance by a railroad company of cars of freight from the initial carrier thereof does not operate as a ratification of an oral contract between the initial carrier and the consignor to carry the goods for less than the usual rate.

Rates—Implied Contract.

Where a common carrier accepts freight without special contract as to the rate to be charged, the law implies an undertaking to charge the usual rate.

Carriers of Freight—Liens.*

A carrier has a lien on freight transported by it for the usual charges of such transportation.

Same—Same.

A common carrier's lien for charges of transportation includes charges which it may have advanced to a preceding carrier.

Same—Same.

A common carrier's lien for transportation charges is not affected by the fact that the previous carrier has been in default by reason of damage to the goods.

*See *Santa Fe Pac. R. Co. v. Bossut* (N. Mex.), 19 Am. & Eng. R. Cas., N. S., 683 (carrier's lien on goods attached in its warehouse); *Penn. Steel Co. v. Georgia R. & Banking Co.* (Ga.), 2 Am. & Eng. R. Cas., N. S., 685 (where stoppage in transit); *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 380 (lien for storage charges); *Swan v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 446.

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Same—Negligence of Connecting Carrier—Liability.†

In the absence of a special contract to deliver freight at a point beyond its line, a common carrier is not liable for negligence occurring after its delivery of the freight to a connecting carrier.

Appeal from Circuit Court, Bourbon County.

"To be officially reported."

Action by Claude M. Thomas against the Frankfort & Cincinnati Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McMillan & Talbott, for appellant.

D. W. Lindsey, Jno. B. Lindsey, and Jno. S. Smith, for appellees.

BURNAM, C. J. This action was instituted by the appellant, Claude M. Thomas, against the appellee, the Frankfort & Cincinnati Railway Company, under section 181 of the Civil Code, for the possession of 116 head of feeding cattle, which he alleged were wrongfully detained from him, and for \$100 in damages. The defendant answered on December 6, 1897, that at 8:30 a. m. the plaintiff, through his agent, the Cincinnati, New Orleans & Texas Pacific Railway Company, delivered to it at Georgetown, Ky., in the usual course of business, three cars of cattle to be shipped over its line to Paris, Ky.; that it paid the agent of the plaintiff \$201 freight reported to be due thereon; that it transported the three cars over its line from Georgetown to Paris, their destination, and that its charges were \$12, which had never been paid; and that it had a lien for the \$201 paid to the Cincinnati, New Orleans & Texas Pacific Railway Company, and for its own charges, amounting in the aggregate to \$213; and that it had refused to surrender the possession of the cattle until this amount was paid—and asked that it be adjudged a lien upon the cattle, and for a sale of a sufficient number to satisfy its bill. The plaintiff replied that on the 2d day of December, 1897, he had contracted with the Memphis & Charlestown Railroad Company to transport from Decatur, Ala., to Paris, Ky., over its own and connecting lines, 116 head of cattle, which were to be shipped in three cars at the agreed price of \$60 per car load, or \$180 for all; that the cattle were to be delivered at Paris, Ky., on Friday, December 3, 1897; that either the Memphis & Charlestown Railroad Company was authorized to make this contract for a through shipment by its connecting lines, or that the connecting lines, by acceptance of the freight, ratified the contract made with him by

†See foot-note appended to *Hartley v. St. Louis, etc., R. Co.* (Iowa), 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569 (not liable in absence of contract); notes, 2 Am. & Eng. R. Cas., N. S., 647; note, 9 Am. & Eng. R. Cas., N. S., 290; *Johnson v. Toledo, S. & M. Ry. Co.* (Mich.), 8 R. R. R. 137, 31 Am. & Eng. R. Cas., N. S., 137 (liability of initial carrier for negligence of connecting carrier in failing to keep car properly iced); foot-note appended to *Elgin, etc., R. Co. v. Bates Mach. Co.* (Ill.), 7 R. R. R. 256, 30 Am. & Eng. R. Cas., N. S., 256.

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the Memphis & Charlestown Railroad Company; that the delivery of the cattle to him at Paris, Ky., had been delayed between 50 and 60 hours in excess of the time agreed upon; and that during this interval they had suffered from want of food and water to such an extent as to damage them at least \$250, which he pleaded by way of set-off and counterclaim. Plaintiff filed with his reply, and as a part thereof, a bill of lading which was delivered to him by the Memphis & Charlestown Railroad Company on the delivery of the cattle to them, and which contains the following stipulation: "I agree that the said Memphis and Charlestown R. R. Co. is only bound to carry said live stock to its freight station at —, and there have the same ready to be delivered and unloaded by the consignee or upon his orders, or to such company or carrier (if the same is to be forwarded beyond said station) whose lines may be considered as forming a part of the route to the destination to which said stock is consigned; and I expressly agree that the responsibility and liability of said Memphis and Charlestown R. R. Co., and any and all connecting lines or companies as common carriers shall cease at the end of their respective roads or routes. * * * I further agree that I will load, unload or transfer said stock at my own risk and expense, and that in the event of accidents or delays from any cause whatever, I will, at my own expense, feed, water and take care of said stock, or cause the same to be done for me." The bill of lading does not set out the alleged or any agreement as to the price for which the cattle were to be transported. The defendant filed a general demurrer to the reply, which was sustained, and, plaintiff declining to plead further, judgment was entered for the defendant, and plaintiff has appealed.

The reply contains no allegation that the Frankfort & Cincinnati Railroad Company ever authorized the Memphis & Charlestown Railroad Company to contract for it for a through rate on the stock at \$60 a car from Decatur to Paris, or that it had any knowledge of such alleged contract when it received these cars from the Cincinnati, New Orleans & Texas Pacific Railway Company at Georgetown, Ky. And there is certainly nothing in the mere acceptance by them of these cars to authorize the inference that it ratified the alleged parol contract for a through rate of \$180, as it had no right, under the law, to refuse to receive from a connecting line cars of such line loaded with freight which is ordinarily transported between railroad companies according to the proper and usual course of business. 5 Encyl. of Law (2d Ed.) 160, and authorities there cited. As the bill of lading is silent as to the charges at which the stock was to be transported, and appellee had no information of the alleged special parol contract, the law implies an undertaking to carry at the usual and ordinary rate for which such services are performed, and there is no allegation in the reply that the charge of \$213

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was in excess of the usual and ordinary rate. See *Georgia R. Co. v. Murray* (Ga.) 11 S. E. 779. And a carrier has a lien on freight transported by it for the usual and customary charges of such transportation. And this lien covers charges which a connecting carrier has advanced to the preceding carrier. See 6 Cyc. 502; *Cayo v. Pool's Assignee* (Ky.) 55 S. W. 887, 49 L. R. A. 251. Nor will the lien be affected by the fact that the previous carrier has been in default by reason of damage to the goods. See *Bowman v. Hilton*, 11 Ohio, 303, and *Ray on Negligence of imposed Duties*, 864. There is no allegation of negligence on the part of appellee after the receipt by them of the cars from either connecting carrier at Georgetown, Ky. Besides, the claim for damages in this case is based upon the alleged contract of the Memphis & Charlestown Railroad Company to deliver the cattle in Paris, Ky., on Friday, December 3, 1897, whilst the bill of lading, which is made a part of the reply, contains no such stipulation, but only undertakes to carry the cars to the end of their line and deliver them to the connecting carrier. The law is well settled that, in the absence of a special contract by the carrier to deliver stock at a point beyond its line, it is not liable for negligence after its delivery to the connecting carrier. See *L. & N. R. Co. v. Cooper* (Ky.) 42 S. W. 1134; *Bryan v. M. & P. R. Co.*, 74 Ky. 597; *L. & N. R. Co. v. Tarter* (Ky.) 39 S. W. 698; *Elliott on Railroads*, § 433; *Ireland v. Mobile & Ohio R. Co.*, 105 Ky. 400, 49 S. W. 188, 453. In the case of *Boogs, etc., v. Martin*, 52 Ky. 239, the entire shipment was by one vessel from New Orleans to Louisville. There was no question of the payment by the delivering carrier of charges to the preceding carrier, and therefore has not application to the facts of this case. But it was there held that a carrier had a lien on goods carried, which he might detain until the freight was paid.

For reasons indicated, the judgment is affirmed.

ILLINOIS CENT. R. CO. v. BYRNE.

(*Supreme Court of Illinois, Oct. 26, 1903.*)

[68 N. E. Rep. 720.]

Contract to Haul Car—Validity—Instruction.

Act March 31, 1874, § 21 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3277), provides that no freight car shall be run in the rear of passenger cars. In an action for damages because of a railroad's failure to haul a car as agreed, one of the defenses was that the contract was to haul the car, which had a broken drawbar, on a certain passenger train, which contract was illegal, and the court instructed that, if the agent agreed with plaintiff to haul the car at the end of the train, such agreement was wholly void: *held*, that defendant had no reason to complain.

Same—Defect—Waiver.

Where a railroad agreed to haul a car, one of the drawbars of which was broken by attaching the good end of it to a locomotive or train, it waived any objection that the car was not in proper condition for transportation.

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Appeal—Review.

The judgment of the Appellate Court affirming a judgment of the trial court is binding on the Supreme Court so far as it concerns questions of fact.

Same—Validity—Instruction.

Act March 31, 1874, § 21 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3277), provides that no freight car shall be run in the rear of passenger cars. In an action against a railroad for damages for failure to haul a car as agreed, one of the drawbars being broken, defendant contended that the contract was to haul the car by a certain passenger train, and plaintiff contended that the contract was merely to haul the car. The court instructed that if the contract was made without reference to any particular train, and the railroad could have hauled the car attached either to a locomotive or the rear end of a train other than a passenger train, plaintiff could recover; but that, if the contract was that the car should be hauled by a certain passenger train, the railroad was not required to haul it by any other train; and, if it could not be safely carried save at the rear thereof, plaintiff could not recover: *held*, that defendant could not complain of the instructions.

Instructions.

Instructions are not erroneous because not reciting all the facts relied on by defendant, where the facts omitted are merely circumstances which are a part of the testimony tending to disprove plaintiff's cause of action, and are not controlling circumstances.

Same.

A party cannot complain of an error in an instruction when a similar error appears in an instruction given at his own request.

Contract to Haul Car—Breach—Damages.*

In an action against a railroad for damages suffered by a theatrical company by reason of defendant's failure to haul a car of scenery to a certain city within the time agreed, the evidence showed that the show could not get to the city so as to fill an engagement there; that the advance sale of tickets had been refunded to the purchasers; that there was a contract between plaintiff and the opera house whereby plaintiff was to receive a certain per cent. of the sales; and there was evidence that the railroad was informed that the object of hauling the car was to give the theatrical performance in question: *held*, that it was proper to instruct that plaintiff was entitled to recover all additional expense incurred by him and all profits which he would have received, after deducting the expense of advertising his show, if the car had been hauled in time to enable him to give the performance.

Same—Same—Same.*

It was proper for the jury to take into consideration the nature of plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated.

*As to what damages are recoverable for failure to carry freight, or delay in carrying it, see note, 8 Am. & Eng. R. Cas., N. S., 514 (delay in transportation of live stock); foot-note appended to Louisville & N. R. Co. v. Frazee (Ky.), 6 R. R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22 (shipper not bound by clause of accepted bill of lading fixing value of horses); Louisville & N. R. Co. v. Hull (Ky.), 3 R. R. R. 56, 26 Am. & Eng. R. Cas., N. S., 56 (excessive verdict for delay in shipment of corpse); Sharpe v. Southern Ry. Co. (N. Car.), 3 R. R. R. 652, 26 Am. & Eng. R. Cas., N. S., 652 (legal interest on capital invested, the proper measure of damages for delay in transportation of machinery); Texas & N. O. R. Co. v. Bigham (Tex.), 3 R. R. R. 34, 26 Am. & Eng. R. Cas., N. S., 34 (special damages for injury to goods); Galliers v. Chicago, B. & Q. R. Co. (Iowa), 3 R. R. R. 28, 26 Am. & Eng. R. Cas., N. S., 28 (evidence as to cost of horse admissible in action for its loss); Sloop v. Wabash R. Co. (Mo.), 2 R. R. R. 937, 25 Am. & Eng. R. Cas., N. S., 937 (measure of damages for failure to deliver live stock in reasonable time); Gulf, C.

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Appeal from Appellate Court, Third District.

Action by John F. Byrne against the Illinois Central Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 9) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit in assumpsit brought by the appellee against the appellant company in the circuit court of McLean county to recover damages for a breach of contract alleged to have been made by the appellant company with the appellee to haul a car, loaded with scenery and theatrical property belonging to the appellee, from Decatur to Bloomington. Appellee was the owner and manager of a traveling theatrical troupe known as the "Eight Bells Company." This company gave a performance in Decatur on Saturday night, February 2, 1895, and was to give another in Bloomington on the following Monday night, February 4th. It is claimed by appellee that, by reason of the failure of the appellant to haul said cars agreed, appellee missed his engagement to give a performance in Bloomington as previously advertised, and to which appellee had sold a large number of tickets, and to which he could have sold more tickets had he been able to keep his engagement. Bloomington is distant 42 miles from Decatur, and it is claimed by appellee that, on account of appellant's refusal to perform its contract to haul this car filled with theatrical scenery and properties from Decatur to Bloomington in time to enable appellee to give his performance in Bloomington, appellee suffered damages. Appellee's claim is that he had a contract with the manager of an

& S. F. R. Co. *v.* Houghton (Tex.), 3 R. R. R. 697, 26 Am. & Eng. R. Cas., N. S., 697 (measure of damages for improper treatment of cattle); Pierce *v.* Southern Pac. Co. (Cal.), 10 Am. & Eng. R. Cas., N. S., 88 (price of goods at point of shipment may be made measure of damages for their loss, by special contract); Illinois C. R. Co. *v.* Bogard (Miss.), 18 Am. & Eng. R. Cas., N. S., 410 (measure of damages for nondelivery of freight); Swift River Co. *v.* Fitchburg R. Co. (Mass.), 8 Am. & Eng. R. Cas., N. S., 512 (expenses incurred in seeking delayed goods); Illinois C. R. Co. *v.* Southern S. & C. Co. (Tenn.), 18 Am. & Eng. R. Cas., N. S., 276 (interest and measure of damages for delay); Yazoo & M. V. R. Co. *v.* Millsaps (Miss.), 17 Am. & Eng. R. Cas., N. S., 269 (measure of damages for injury to goods while negligently delayed by carrier); Downing *v.* Outerbridge (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 861 (measure of damages for loss of goods); Baxley *v.* Tallassee, etc., R. Co. (Ala.), 21 Am. & Eng. R. Cas., N. S., 170 (measure of damages for breach of contract to furnish cars); Bigelow *v.* Chicago B. & N. Ry. Co. (Wis.), 17 Am. & Eng. R. Cas., N. S., 341 (measure of damages for breach of contract to carry goods); St. Louis, I. M. & S. Ry. Co. *v.* Law (Ark.), 18 Am. & Eng. R. Cas., N. S., 286 (depreciation in value of live stock caused by delay in furnishing cars); Paddock *v.* Missouri Pac. Ry. Co. (Mo.), 17 Am. & Eng. R. Cas., N. S., 310 (injury to live stock in transit); Missouri, etc., Ry. Co. *v.* Truskett (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 618; St. Louis, I. M. & S. Ry. Co. *v.* Edwards (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 402 (delay in transportation of live stock); Pittsburgh, C., C. & St. L. Ry. Co. *v.* Sheppard (Ohio), 6 Am. & Eng. R. Cas., N. S., 528 (evidence of value of trotting horse); Milam

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opera house in Bloomington to give his performance on the evening of Monday, February 4th, and had advertised the performance, so to be given, by newspaper and billboard.

About 10 days or more before the car was to be hauled from Decatur, appellee's advance agent went to an agent of appellant in Decatur to make the contract. The car arrived in Decatur over the Vandalia Line from Terre Haute at 11 o'clock on Saturday morning, February 2, 1895. On the way from Terre Haute to Decatur one of the drawbars of the car was pulled out, but was recoupled in the train by means of a chain, and in that manner the car was hauled safely to Decatur. It is claimed on the part of the appellee that the Vandalia Line delivered the car to appellant, and that it was accepted by appellant between 4 and 6 o'clock on the afternoon of Saturday. There is, however, a dispute in the evidence as to its acceptance. The evidence tends to show, however, that, under the order of one of appellant's agents, appellant's switch crew took the car from the place where it had been placed by the Vandalia Line, turned it around, and hauled it to a place where appellee could unload it, and then, after the performance in Decatur on Saturday night, the car was reloaded and returned to a proper place in the yards of the company, where it remained all day the following Sunday, February 3d, ready to be attached to a train to be hauled to Bloomington.

As soon as the car and company arrived in Decatur, appellee's agent went to the office of appellant's ticket agent, and told him that the drawbar was out of order. The ticket agent claims that he told appellee's agent that the car would

v. Southern Ry. Co. (S. Car.), 18 Am. & Eng. R. Cas., N. S., 253 (opinion evidence of owner as to damages to live stock in transit); *Pennsylvania Co. v. Kenwood (Ill.)*, 9 Am. & Eng. R. Cas., N. S., 556 (damages to goods through negligence of shipper); *Pierce v. Southern Pac. Co. (Cal.)*, 10 Am. & Eng. R. Cas., N. S., 88 (injury to trees from cold in transit); *Illinois Cent. R. Co. v. Radford (Ky.)*, 23 Am. & Eng. R. Cas., N. S., 124 (excessive verdict based upon supposed pedigree of horse); *Gulf, Colorado, etc., R. Co. v. Hodge (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 574 (measure for loss of goods); *Missouri Pac. R. Co. v. McGrath (Kan.)*, 3 Am. & Eng. R. Cas., N. S., 424 (measure for delay in delivery); *Merrill v. Pacific Transfer Co. (Cal.)*, 21 Am. & Eng. R. Cas., N. S., 143 (purchase of wearing apparel, in action for loss of trunk); *Louisville & N. R. Co. v. Stewart (Miss.)*, 21 Am. & Eng. R. Cas., N. S., 855 (sentimental value of family portraits); *Missouri, K. & T. Ry. Co. of Texas v. Belcher (Tex.)*, 3 Am. & Eng. R. Cas., N. S., 498 (special damages for delay in delivery of freight); *St. Louis, I. M. & S. Ry. Co. v. Law (Ark.)*, 18 Am. & Eng. R. Cas., N. S., 286 (depreciation from delay in furnishing cars); *Gulf, Colorado, etc., R. Co. v. Hughes (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 507 (delay in transportation of live stock); *Gulf, Colorado, etc., R. Co. v. Stanley (Tenn.)*, 2 Am. & Eng. R. Cas., N. S., 480 (deterioration of live stock); *San Antonio & A. Pass. R. Co. v. Pratt (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 505 (injury to live stock from delay); *Williams v. Houston & Texas Central R. Co. (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 533 (measure of damages for injury to live stock); *St. Louis Southwestern R. Co. v. Smith (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 531 (measure of damages for injury to live stock through negligence).

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have to pass appellant's inspection, and appellant also claims that appellee's agent replied that the Vandalia people were going to fix the car. Appellee's agent then paid to appellant's agent \$15, the price asked for hauling the car from Decatur to Bloomington. Appellee's agent also paid the fare of the members of the troupe, being about 20 in number, from Decatur to Bloomington, each fare being about \$1.31; and passenger tickets were given to appellee's agent by appellant's agent. A receipt was also given appellee for the \$15. This receipt, though written and issued on Saturday, February 2d, was dated Monday, February 4th, the day when the car was to be hauled from Decatur to Bloomington. The receipt is as follows:

"Illinois Central Railroad Company,

"Decatur, Ill. City Station, Feb. 4, 1895.

"Received of W. E. Flack, manager Eight Bells Company, \$15.00 for hauling car Decatur to Bloomington.

"E. Pennywell, C. T. A., M. E.

"Illinois Central R. R., February 4, 1895.

"City Office, Decatur, Ill."

A plea of general issue was filed by appellant, and by agreement all evidence, including tender, was to be admitted under the plea of general issue, and all other pleas were withdrawn. The passenger tickets were tendered to appellant at the trial. Appellant tendered the sum paid for tickets and the hauling of the car, and this sum was taken and receipted for by appellee.

It is claimed by appellee that he was prevented by promises of the appellant's agent from making other arrangements to take this car, with its stage scenery and apparatus, from Decatur to Bloomington, until it was too late to reach Bloomington in time for the performance on Monday night. It is claimed that on Monday morning the trainmaster refused to allow the car to go. As it was useless to go without the scenery and baggage, the company was compelled to remain in Decatur, it not being possible to reach Bloomington over any other railroad in time to give the performance on the evening in question. The contention of appellee is that, as the result of appellant's refusal to haul the car, appellee was compelled to, and did, abandon his Bloomington engagement, and instead went to Springfield.

The damage claimed by appellee is the cost for extra board for his company, extra transportation to Springfield, loss of his share of advance sales in Bloomington, and loss of box-office sales that would have been made, based upon previous sales in the same city for the same performance by the same company.

The case was first tried at the April term in the circuit court of McLean county in 1898, and the trial resulted in a verdict and judgment for appellee for \$400, including the sum

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of approximately \$45 for cash paid by appellee to appellant, being the contract price for hauling the car and the company of players from Decatur to Bloomington—which service, however, was never performed. Before the first judgment was rendered, appellant paid that sum to the clerk for appellee, as a tender back of the cash received by it, with interest to the date of the tender. An appeal was taken to the Appellate Court for the Third District, and the judgment was there reversed because of errors in four of appellee's instructions, and error in refusing appellant's eighth refused instruction, as will be seen by reference to the case of Illinois Central Railroad Co. v. Byrne, 78 Ill. App. 204. After the reversal the cause was reinstated on the docket, and subsequently, on June 19, 1900, all the pleadings and depositions in the case were destroyed by a fire which consumed the McLean county courthouse. By agreement, upon the second trial, the transcript of the record was withdrawn from the office of the clerk of the Appellate Court, and the testimony of appellee's witnesses, in the shape of depositions, was read from the transcript, and such of the appellant's testimony as it desired was also read. By agreement, also, it was provided that either party might supplement such testimony by oral testimony of witnesses, if desired.

Upon the second trial of the case, the jury returned a verdict in favor of appellee for \$300; motion for new trial was overruled, and judgment entered upon the verdict. An appeal was taken to the Appellate Court, and the Appellate Court has affirmed the second judgment of the circuit court for \$300, at the same time granting a certificate of importance. The present appeal is prosecuted from such judgment of affirmance.

Charles L. Capen (John G. Drennan, of counsel), for appellant.

A. E. De Mange, for appellee.

MAGRUDER, J. (after stating the facts). The main contentions of the appellant company in this case are, first, that the contract between appellee and appellant was that the car, containing appellee's theatrical scenery and apparatus, should be hauled from Decatur to Bloomington by a passenger train, which was to leave Decatur on Monday morning about 9 o'clock, and that appellant did not agree to haul the car in any other train or in any other way; and, second, that appellant was not obliged to haul the car until it had passed the inspection of its car inspector, and that, by reason of the broken condition of the drawbar on one end of the car, it did not pass such inspection.

In connection with the first contention of the appellant, it claims that it was not bound to perform the contract as made, because such contract was illegal, and in violation of the statute, and also of its own charter. Section 21 of the "Act in relation to fencing and operating railroads," ap-

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proved March 31, 1874, provides as follows: "In no train shall freight, merchandise or lumber cars be run in the rear of passenger cars, and if such cars, or any of them, shall be so run, the officer or agent who so directed, or knowingly suffered such arrangement to be made, shall each be deemed guilty of a misdemeanor, and punished accordingly." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3277. Appellant's contention is that, inasmuch as, by the terms of this statute, it was forbidden to haul the car in question in the rear of the passenger train to start from Decatur on Monday morning, the contract made by it was a void contract, and could not be enforced. It is said, in relation to such a contract, that, the parties being in *pari delicto*, the law leaves them where it finds them, and that no question of estoppel or ratification can possibly arise.

The trial court held the law upon this subject to be as contended for by the appellant, because it gave to the jury for the appellant the following instruction numbered 5, to wit: "Even if you believe from the evidence Hovey [the appellant's freight agent] agreed with plaintiff's manager the defendant should haul the car in controversy at the rear end of the passenger train on Monday morning, such agreement, if any such is shown by the evidence, was one prohibited by the laws of this state, and is wholly invalid and illegal. You are instructed, therefore, such agreement, if any, did not bind the defendant, and as to it you will find the defendant not guilty."

In view of this instruction so given at the request of the appellant, the latter has no reason to complain of the action of the court in that regard. But it was a question in dispute between the parties whether or not the contract was to haul the car by this particular passenger train which was to leave Decatur on the morning of Monday, February 4th, about 9 o'clock. Both parties submitted the question to the jury whether the contract was to haul the car by this particular train, or whether the appellant agreed to haul the car from Decatur to Bloomington in time for the theatrical performance to be given at Bloomington on the evening of Monday, February 4th, without reference to any special or particular train. If the contract was a general agreement to take the car from Decatur to Bloomington in time for the performance, the appellant could have hauled it by attaching it to a locomotive, or a freight train, and thus a violation of the statute by attaching it to a passenger train would have been avoided.

It is true that the drawbar at one end of the car in question was broken, but there is testimony tending to show that the drawbar at the other end of the car was in good condition, and that, by turning the car around and attaching the end where the drawbar was not broken, the car could have been hauled from Decatur to Bloomington within the time specified;

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and there is also evidence tending to show that the appellant, through its agent or agents, agreed thus to haul it, or allowed appellee to believe that they would so haul it. If the appellant agreed to haul the car by thus attaching the end of it which was in good condition to some locomotive or train, it waived its objection that the car was not in good condition for transportation. These questions were all questions of fact, and were submitted to the jury by proper instructions, and the jury have found them against the appellant. The judgment of the Appellate Court, affirming the judgment of the circuit court, is binding upon us, so far as these questions are concerned.

For instance, the second instruction given for the appellee by the trial court was as follows: "If you believe from the evidence plaintiff made a contract with the Illinois Central Railroad Company to haul his car from Decatur to Bloomington, without reference to any particular train it should be connected with, or to the condition of the car, in time to enable him to give his show there, and that he paid for such hauling; and if you further believe from the evidence said railroad company could have hauled said car, coupled by its good end either to a locomotive or to the rear end of a train, other than a passenger train, without danger in excess of the ordinary danger incident to the hauling of other cars; and if you further believe from the evidence plaintiff informed said railroad company's agents at Decatur of his engagement or contract to give a show in Bloomington on the evening of February 4, 1895, and that, after said agents became so informed, the said railroad company failed or refused to haul said car to Bloomington in time to enable plaintiff to give his show in Bloomington—then the plaintiff is entitled to recover all additional expense, if any has been shown by the evidence, necessarily incurred by him, and all profits which he would have received for giving the said performance in Bloomington, after deducting the expense of advertising his show in Bloomington, if said car had in fact been hauled to Bloomington in time to enable him to give said show in Bloomington, if you believe from the evidence he would have received any such profits."

This instruction submitted to the jury the question whether or not the contract was that appellant should haul the car to Bloomington without reference to any particular train it should be connected with, and without reference to the condition of the car. It also left to the jury to find whether the car could have been hauled, even if the drawbar at one end of it was broken, by coupling its good end to a locomotive, or to the rear end of a train other than a passenger train.

The court gave a number of instructions for appellant, and among others, the following numbered 2, to wit: "In the absence of a contract or agreement to the contrary, the de-

defendant was not required or bound in law to haul the car in controversy in any other train or in any other way than contemplated or provided in such contract or agreement. And if, therefore, you believe from the evidence the contract or agreement in this case was the car in controversy should be hauled in or by the Monday morning passenger train, then the defendant was not required to haul it in any other train, or in a special train, or by a special engine. And if you believe from the evidence that plaintiff's car, when said passenger train reached Decatur, was in such condition it could not be safely hauled from Decatur to Bloomington except at the rear of the train, and as the rear car of the train, your verdict should be for the defendant." By this instruction the appellant submitted the question to the jury whether or not the contract was such a contract as the appellant claimed it to be, and it also embodied the theories of the appellant as to the contract and as to the condition of the car. We are unable to see, therefore, that the appellant was in any way injured, or its rights prejudiced, by the action of the court in the giving of instructions.

Again, the court gave to the jury, in behalf of the appellant, an instruction numbered 6, which was as follows: "The court instructs you that, if the plaintiff contracted for the transportation of the car in controversy from Decatur to Bloomington by the passenger train that left on Monday morning, and that no contract was made to haul it by any other train, and if you further believe from the evidence that the condition of said car on Monday morning was such that it could not safely be carried in any other place in the train than at the rear, and as the rear car, your verdict in such case must be for the defendant."

Several of the instructions, given by the trial court for the appellee, are complained of by the appellant upon the ground that they do not recite all the facts relied upon by the appellant in its defense to the action, but only recite such facts as are necessary to warrant the jury in finding for the appellee. The instructions are not objectionable for the reason thus insisted upon. These instructions are based upon the hypothesis or theory contended for by the appellee, and they summarize the elements necessary to a recovery upon that theory, without omitting any essential matter. In *Chicago & Alton Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, we said (page 24, 192 Ill., and page 627, 61 N. E.): "The rule that an instruction is erroneous which sums up all or a part of the facts which the evidence tends to prove on one side, and omits the facts on the other side, does not apply to an instruction which merely fails to embody evidence tending to establish a distinct antagonistic theory. * * * All the law requires is that an instruction, based upon some particular hypothesis warranted by the evidence,

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which undertakes to summarize the elements in the cause essential to a recovery upon that theory, must not omit any essential matter. * * * It is not necessary to incorporate all the evidence in an instruction, but only matters which constitute a material issue in the case." In the case at bar the facts which are alleged to have been omitted in the instructions for the appellee are merely circumstances which are a part of the testimony tending to disprove the appellee's cause of action, and are not controlling circumstances. The appellant asked, and the court gave in its behalf, an instruction similar to those complained of as having been given for the appellee, which embodied facts establishing the particular hypothesis or theory for which appellant contended. Several instructions were thus given for appellant which presented appellant's grounds of defense, but did not include all the facts tending to establish appellee's right of recovery. "A party has no right to complain of an error in an instruction when a like error appears in an instruction given at his own request." *Chicago & Alton Railroad Co. v. Harrington*, *supra*, and cases there referred to.

Some of the instructions given for the appellee are also criticised by appellant's counsel upon the alleged ground that they lay down an improper rule as to the damages to be recovered, but we do not regard them as erroneous in this respect. The evidence tends to show that appellee and his troupe could not go from Decatur to Bloomington, and were detained in Decatur, and that they had to be transported by another route to Springfield. The evidence tends to show, also, that the advance sale of tickets to the show, which had been made in Bloomington, amounted to \$100; that this amount had to be refunded to the ticket purchasers; and that the advance and box-office sales together would have amounted to about \$500, estimated by the amount of sales at previous exhibitions of the performance. The evidence also tended to show that there was a contract between appellee and the owner of the opera house in Bloomington, where the show was to take place, by the terms of which appellee was to receive 70 per cent. of the sales. There was evidence also tending to show that the appellant or its agents were informed that the object of going from Decatur to Bloomington was to give this show on the night of February 4th. The instructions left it to the jury to determine whether or not the proper notice and information were communicated by appellee or his agents to appellant or its agents as to the purpose of hauling the car to Bloomington, and as to appellee's contract in relation to the same. In estimating the losses sustained by reason of the failure to perform a contract of this character, it is proper for the jury to take into consideration the nature of the plaintiff's business and his profits for a reasonable period next preceding the time

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when the contract was violated. Chapman v. Kirby, 49 Ill. 211.

We find no error in the record which would justify us in reversing the judgment of the Appellate Court. Accordingly that judgment is affirmed. Judgment affirmed.

MCGREW v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Division No. 2, Nov. 17, 1903.*)

[76 S. W. Rep. 995.]

Judicial Notice.*

The court will take judicial notice of the geographical position of towns on a line of railroad.

Freight Charges — Discrimination — Statutes—Construction—Implied Repeal.

Rev. St. 1889, § 2629, forbidding any railroad from charging over any portion of its road a greater compensation than it charges for the transportation of similar quantities of the same class of goods over any other portion of equal distance, which was passed in pursuance of Const. art. 12, § 12, containing much the same language, and requiring the passage of suitable enforcing acts by the Legislature, was not repealed by Rev. St. 1889, § 2637, subsequently enacted, and which forbids railroads from charging a greater aggregate compensation for the transportation of like property "under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction," especially since another section of the latter act (Rev. St. 1889, § 2659) expressly provides that it is not intended to repeal any law in force unless in direct conflict therewith; but both sections may stand together, the former regulating freight charges in any direction over any part of the road, and the latter in the same direction under like circumstances and conditions.

*As to judicial notice of matters relating to railroads, see extensive note, 16 Am. & Eng. R. Cas., N. S., 581 et seq.; Chinn v. Chicago & A. Ry. Co. (Mo.), 8 R. R. R. 289, 31 Am. & Eng. R. Cas., N. S., 289 (judicial notice of increase in traffic, in action for delay in transportation of live stock); Carrow v. Barre R. Co. (Vt.), 4 R. R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933 (judicial notice will not be taken of weight of artificial leg); Arkansas v. Kansas & Texas Coal Co. (U. S.), 1 R. R. R. 337, 24 Am. & Eng. R. Cas., N. S., 337 (passenger routes, in suit to enjoin importation of armed men where strikes exist); Birmingham Southern R. Co. v. Cuzzart (Ala.), 3 R. R. R. 312, 26 Am. & Eng. R. Cas., N. S., 312 (whether weak eyes may be inherited); Meuer v. Chicago, etc., Ry. Co. (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 493 (law of foreign state); McDonald v. Illinois Cent. R. Co. (Ill.), 20 Am. & Eng. R. Cas., N. S., 309 (clearance cards); McKibbin v. Great Northern Ry. Co. (Minn.), 16 Am. & Eng. R. Cas., N. S., 155 (customs); Foster v. Chicago, R. I. & T. Ry. Co. (Tex.), 3 Am. & Eng. R. Cas., N. S., 2 (deposit of award, in eminent domain proceedings); St. Louis, I. M. & S. Ry. Co. v. Brown (Ark.), 16 Am. & Eng. R. Cas., N. S., 440 (federal statutes); Crandall v. Great Northern Ry. Co. (Minn.), 21 Am. & Eng. R. Cas., N. S., 388; Ex parte Northeastern R. Co. (S. Car.), 21 Am. & Eng. R. Cas., N. S., 99 (laws of sister state); Atchison, T. & S. F. Ry. Co. v. Ryan (Kan.), 21 Am. & Eng. R. Cas., N. S., 684 (life tables); Knowlton v. New York, N. H. & H. R. Co. (Conn.), 16 Am. & Eng. R. Cas., N. S. 573 (opening of railroad); Jackson v. Kansas City, etc., R. Co. (Mo.), 19 Am. & Eng. R. Cas., N. S., 99 (statute incorporating city); Jones v. Flint & P. M. R. Co. (Mich.), 21 Am. & Eng. R. Cas., N. S., 904 (that unblocked frog could have been seen by deceased brakeman).

McGrew v. Missouri Pac. Ry. Co

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by James C. McGrew against the Missouri Pacific Railway Company. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed.

Alexander Graves, for appellant

Martin L. Clardy and Wm. S. Shirk, for respondent.

GANTT, P. J. The plaintiff brought his action returnable to the December term, 1899, of the Lafayette circuit court. Omitting caption, the petition is in the following words: "Plaintiff avers: That the defendant is, and has been ever since the month of October 1879, a railroad corporation duly organized under the general corporation law of the state of Missouri, and on the dates and at the times hereinafter named was engaged in the transportation of freight and passengers between the points in said state as hereinafter set forth. That the plaintiff is, and was during all the dates hereinbefore and hereinafter named, engaged in the coal business, having his mines near Myrick, one of defendant's stations, shipping coal to Kansas City, Missouri, another of defendant's stations. That the plaintiff shipped by defendant's line of railroad on certain days of September, 1897, from said Myrick, to various persons, as consignees, at said Kansas City, the following freight, to wit, 138 and 60-100 tons of mine run coal in cars numbered 12,665, 12,558, 105, 4,145, 3,923, 10,960, 4,112, for which defendant fixed, charged, demanded, and received 55 cents per ton of plaintiff, and said charge and payment of said freight rate was 15 cents per ton more than defendant was by law entitled to fix, demand, charge, and receive in this, to wit, that during all the said time and dates hereinafter named defendant had fixed, charged, demanded, and received over its said line and over another part of its said road from said station of Myrick and to another of its said stations, namely, Boonville, Missouri, a distance of 77 miles, for the transportation of mine run coal, 40 cents per ton by the car load, while the distance from said Myrick to said Kansas City was only 42 and 30-100 miles, for which said charge of 44 cents per ton for said freight was fixed, charged, demanded, and received, and the same was illegal, and exceeded the amount that the defendant was entitled to charge, fix, demand, and receive for said shipments in the sum of \$20 and 77 cents, an itemized account whereof is herewith filed, marked 'Exhibit A.' Wherefore plaintiff avers that he is aggrieved and damaged in the sum of \$20 and 77 cents, for which he asked judgment, and for his costs, and for all other relief to which he may be entitled under the statute in such cases made and provided." The remaining 20 counts in the petition are identical with the first count above copied, being for each successive month down to and including May, 1899, for similar

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illegal freight charges on coal shipped from said Myrick to Kansas City, amounting in the aggregate to \$2,206.29. To this petition defendant demurred on the ground that neither of the counts stated a cause of action, and the court sustained the demurrer, and, plaintiff declining to amend, judgment was rendered for defendant, and plaintiff appealed to this court.

The aggregate claimed was \$2,206.29, and the prayer for judgment was for treble this amount, or \$6,618.87. The action is statutory, and is grounded on section 2629, Rev. St. 1889, now section 1126, Rev. St. 1899, and is the same as section 820, Rev. St. 1879, which is in these words: "No railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, shall directly or indirectly charge or collect for the transportation of goods, merchandise or property, on its said road for any distance, any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road, nor shall any such railroad corporation charge or collect for the transportation of goods, merchandise or property over any portion of its road a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance. And all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than as hereinbefore prescribed are hereby declared to be void." Section 820, Rev. St. 1879. Other sections of the Revised Statutes applicable to the point are section 2636, which forbids any undue or unreasonable preference to any particular person, company, corporation, or locality in the transportation of goods; and section 2643, which allows treble damages for the doing of any act or thing by said act prohibited to the person injured thereby; and section 2659, which provides that "this article is not intended to repeal any law now in force unless in direct conflict therewith, but is intended to be supplemented to such laws." Section 2637, Rev. St. 1889 provides that: "It shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction: provided, however, that nothing contained in this section shall apply to the carriage, storage, or handling of property either free or at reduced rates for the United States; for the state of Missouri or for any fair, exposition, religious,

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scientific, benevolent or charitable purposes." Sections 12 and 14 of article 12 of the Constitution of Missouri contain the following provisions: "Sec. 12. It shall not be lawful in this state for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same for a less distance than the amount charged for any greater distance; and suitable law shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates." Section 14 is as follows: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways and railroads companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discriminations and extortion in the rates of freight and passenger tariffs on the different railroads in this state and shall from time to time pass laws establishing maximum charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

1. The sole question for determination on this appeal is, did the circuit court err in sustaining defendant's demurrers to plaintiff's petition? If section 2629, Rev. St. 1889, now section 1126, Rev. St. 1899, was still in force, and unrepealed, at the time the alleged shipments of mine run coal were made by plaintiff over defendant's railroad from Myrick to Kansas City, and for which defendant charged and collected 55 cents per ton, and if defendant during the same time only charged other shippers of coal from Myrick to Boonville (a greater distance than from Myrick to Kansas City) 40 cents on the same class of merchandise, then the petition states a good cause of action, and the demurrer should have been overruled; but if, as defendant insists, section 1126, Rev. St. 1899 (or section 2629, Rev. St. 1889), had been repealed by necessary implication by the enactment of section 2637, Rev. St. 1889, now section 1134, Rev. St. 1899, then the demurrer was properly sustained, for the reason that, if section 1134, Rev. St. 1899, governed, the plaintiff's petition is defective in failing to aver that the excessive rates were charged for shipments made under "similar circumstances and conditions, and over the same line, and in the same direction." It is obvious at the outset that the plaintiff was not endeavoring to state a case under section 1134, Rev. St. 1899, because this court will take judicial cognizance that a shipment from Myrick to Kansas City was not in the same direction that the shipment from Myrick to Boonville was, but in fact was in an opposite direction. If plaintiff must rely on section 1134, it is plain he could not recover on the facts alleged. But if section 1126 was, and is still, the law of this state, his allegations state a cause of action, because that section does not confine the prohibition against discrimination in freight rates to shipments in the same direction, and under similar circum-

stances and conditions, but forbids the defendant company to charge or collect over any portion of its road "a greater amount as toll or compensation than it charges or collects for the transportation of similar quantities of the same class of goods, merchandise, or property over any other portion of its road of equal distance"—that is to say, whether in the same or opposite direction; and consequently that section, if still in force, fully covered the charge of discrimination made by plaintiff of a shipment over defendant's road in an opposite direction.

In view of the organic and statutory provisions above noted, the judgment of the circuit court can be sustained only on the ground upon which it based it, to wit, that section 1126, Rev. St. 1899 (or section 2629, Rev. St. 1889), was repealed by the passage of the act of 1887, of which section 2637, Rev. St. 1889, or section 1134, Rev. St. 1899, was a part, and known as section 4 of that act (Laws Mo. 1887, p. 17), and such is now the contention of defendant. Whether the enactment of section 2637, Rev. St. 1889 (section 4 of the act of 1887), repealed section 2629 of the Revised Statutes of 1889, is the question to which we must address ourselves. The law on this subject is settled in Missouri. "Repeals by implication are not favored by the courts for cogent and sufficient reasons, not necessary to repeat, and the prior law is to be upheld if the two acts may well subsist together." "In order that the latter shall operate a repeal of the former, the two acts must be irreconcilably inconsistent, or it must clearly appear that the Legislature intended by the latter act to prescribe the only rule that should govern in the case provided." *Manker v. Faulhaber*, 94 Mo., loc. cit. 439, 440, 6 S. W. 372. In *State ex rel. v. Walbridge*, 119 Mo. 389, 24 S. W. 457, 41 Am. St. Rep. 663, this court, through Judge Sherwood, said: "A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent laws cover some, or even all, of the cases provided by it, for they may be merely affirmative, cumulative, or auxiliary; but there must be positive repugnancy between the provisions of the new law and those of the old. Even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy." Applying these long-recognized principles of construction to these two sections, 2629 and 2637, Rev. St. 1889, or sections 1126 and 1134, Rev. St. 1899, it is at once apparent that by their terms they were intended to apply to different conditions. The first, or section 1126, Rev. St. 1899, had and has for its object the regulation of freight charges in any direction—the same or opposite directions—on the same road and over any portion of the same road, regardless of "circumstances or conditions," and is in the language of the Constitution itself (article 12, § 12, *supra*); whereas section 1134, Rev. St. 1899, by its terms is limited

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to shipments over that part of the railroad "in the same direction, under similar circumstances and conditions"; and both can readily stand together. *State ex rel. v. County Court*, 41 Mo. 553; *State ex rel. v. Draper*, 47 Mo. 29. Moreover, we are not left in doubt as to the intention of the Legislature when it passed section 1134, Rev. St. 1899, because in the same act it declared in section 2659, Rev. St. 1889: "This act is not intended to repeal any law now in force unless in direct conflict therewith, but is intended to be supplemental to such laws." As section 1134 in no manner attempted to regulate freight charges in opposite directions, and as section 1126 did provide for shipments in opposite as well as in the same direction, it is obvious that section 1134 did not intend or attempt to repeal the law provided for a state of case to which it had no reference whatever, and hence is not repugnant to the provisions of the former act. Another and cogent reason why section 1134 should not be held to have repealed section 1126 is that the latter was passed in obedience to the mandate of the Constitution itself in section 12 of article 12 of that instrument. That the people in their organic law and the Legislature had plenary power to thus legislate for the control of common carriers like railroads is too plain for discussion, and, being a legislative function, it is not for the courts to thwart the action of the General Assembly. If any reason were necessary to support this enactment of the Legislature, it might easily be discerned in the purpose of the Legislature to prevent a common carrier discriminating against one locality or shipper in the interest of a rival locality or person. It is easy to conceive two cities or towns or manufacturing plants being equi-distant from coal mines on the same railroad and in opposite directions, and, if section 12 of article 12 of the Constitution, and section 1126, Rev. St. of 1899, were not in force, the people of the one locality, or a manufacturer therein, would be required to pay such excessive rates on its fuel as to amount to a virtual deprivation, whereas its rival or competitor might grow rich at its or his expense by virtue of a monopoly of all the coal. The purpose of the framers of the Constitution, and of the people in adopting it, and of the Legislature in carrying it into effect this provision in section 12 of article 12 as it did by the passage of section 1126, was clearly to require the railroads of the state to serve all shippers on the same terms, and to prevent unjust discrimination. Such a statute will be construed in the most beneficial way "which its language will permit to * * * favor public convenience and to avoid all prejudice to public interests." *Sutherland on Stat. Con.* § 324. Section 5 of article 12 of our Constitution ordains that the police power shall never be "so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals." There is no reason why a shipper on the same railroad shall

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be required to pay greater compensation or larger tolls on the same class of freight or property going in one direction than that paid by other shippers on like freight in an opposite direction for the same distance, and the Constitution, and section 1126, passed in obedience to it, clearly prohibit that he should.

Without further elaboration, we are of opinion that the passage of section 1134, Rev. St. 1899, did not repeal section 1126, Rev. St. 1899, by implication, and that the latter section is still in force, and was operative when the alleged shipments were made, and the petition therefore stated a good cause of action, and the demurrer was erroneously sustained.

The judgment of the circuit court is reversed, and the cause remanded for trial.

BURGESS and FOX, JJ., concur.

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(*Supreme Court of Appeals of Virginia, Nov. 19, 1903.*)

[45 S. E. Rep. 802.]

Branch Railways—Right to Acquire.

Under Acts 1897-98, p. 172, c. 168, providing that the directors of a railway company may construct branch roads not exceeding five miles each way in length, and under a resolution adopted in general meeting may construct or purchase branch roads not exceeding twenty miles in length, the requirement to construct by resolution has no application where the branch road does not exceed five miles in length.

Same—Same—Eminent Domain—Spur Tracks to Private Property.*

A railway company may exercise the power of eminent domain in acquiring property necessary for the construction of a branch track to reach a private industrial enterprise, if the track is to be used by the railway company in furtherance of its public business.

Eminent Domain—Exercise of Discretion—Judicial Discretion.†

Railway companies, in the exercise of the power of eminent domain, may decide within certain limitations what and how much land they will condemn for their purposes, and the courts will not undertake to control their discretion in taking property for their use unless there has been a clear abuse of power.

*See note, 20 Am. & Eng. R. Cas., N. S., 614 (power to condemn right of way for railroad branches, spurs, or private railroads, to or from private property to be specially benefited); 13 Am. & Eng. R. Cas., N. S., 448 (spur track as public use); 13 Am. & Eng. R. Cas., N. S., 855 (right to construct branch road); 17 Am. & Eng. R. Cas., N. S., 259 (collateral enterprises and facilitation of prospective business); *Morrison v. Thistle Coal Co.* (Iowa), 7 R. R. R. 462, 30 Am. & Eng. R. Cas., N. S., 462 (right of way for railroad to mine); *In re Minneapolis & St. L. R. Co. v. Nicolin* (Minn.), 13 Am. & Eng. R. Cas., N. S., 445 (spur track as public use); *Chicago & N. W. Ry. Co. v. Morehouse* (Wis.), 23 Am. & Eng. R. Cas., N. S., 413 (spur track to manufacturing establishments as a public use).

†See foot-note appended to *McKennon v. St. Louis, etc., Ry. Co.* (Ark.), 21 Am. & Eng. R. Cas., N. S., 527; *Bigelow v. Draper* (N. Dak.), 7 Am. & Eng. R. Cas., N. S., 771 (necessity a judicial question).

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Same—Whether Question Legislative or Judicial.

The question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional or statutory provisions to the contrary, is legislative, and not judicial.

Error to Shenandoah County Court.

Condemnation proceeding by the Southern Railway Company against Abram Zircle. From an order of condemnation defendant brings error. Affirmed.

D. O. Dechert, Burwick & Williamson, and J. M. Brenaman, for plaintiff in error.

Downing & Richards and M. L. Walton, for defendant in error.

WHITTLE, J. This is a writ of error to an order of the county court of Shenandoah county condemning 2.3 acres of land, the property of the plaintiff in error, Abram Zircle, for the purposes of the defendant in error, the Southern Railway Company, in constructing a branch road or spur track springing from a point on the Manassas Branch of the Southern Railway, near Forrestville, and extending a distance of two-thirds of a mile, to Manor Mills.

The act under which these proceedings were had provides that: "The president and directors of any company incorporated to construct a railroad or other work of internal improvement may cause to be made in connection therewith, or may purchase branch railroads or lateral works not exceeding five miles each way in length, and under a resolution adopted in general meeting by two-thirds of all the votes of all the stockholders may cause to be made, or may purchase branch railroads or lateral works not exceeding twenty miles in length." Acts 1897-98, p. 172, c. 168.

It is insisted by plaintiff in error that the county court was without jurisdiction in the premises, for the following reasons:

(1) Because it does not appear that the resolution provided for in the foregoing statute was ever adopted by the stockholders, and

(2) Because the Southern Railway Company, after it had determined to construct the branch road or spur track in question, made no attempt to purchase the land in controversy before instituting condemnation proceedings, as required by section 1074 of the Code. In respect to these contentions it is sufficient to remark of the first, that the requirement referred to has no application where, as in this case, the branch road or lateral work does not exceed five miles in length; and, of the second, that it is not sustained by the evidence. The controlling question in the case involves the power of the Southern Railway Company to condemn the land in controversy for the purpose indicated. The contention of plaintiff in error in that regard is that the

object of the proceeding was to build a spur track to a private enterprise, Manor Mills, whose output the railway company already handled, for the sole benefit and convenience of the owners of that property. In other words, that it was an attempt on the part of the railway company to condemn private property for private use, and was therefore without sanction of law.

While the agreement between the railway company and the mill company justifies the conclusion that the primary object in constructing the spur track was to reach that industry, it also appears that it was for the use of the railway company and third parties (the public, who might choose to patronize the railway company) as well. The circumstance that the mill company agreed, in the first instance, to contribute a certain amount to the cost of constructing the track, does not affect the legal aspect of the case. The contract stipulated that the sum so advanced was to be returned by the railway company, which was to become the absolute owner of the property. So that the transaction in legal effect amounted merely to a loan by the mill company to the railway company.

The authorities practically speak with one voice to the effect that, if the use to be subserved is a public use, the fact that the branch road inures to the advantage of a particular individual or class of individuals will not render the use any the less public.

Indeed, it is a matter of common observation that the possibility of reaching industrial enterprises along the proposed route of a railway is a legitimate and important factor in determining the question of location.

Lewis, in his work on Eminent Domain, at section 165, says, " 'Public use' means the same as 'use by the public.' " The test whether a use is public or not may be determined by the fact that, where the use is public, a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it cannot be deprived by the company without a reasonable excuse; and by the further fact that the state retains the power to regulate and control the franchises of the company, and to prescribe the amount of charges and tolls which it shall be lawful for the company to exact for the transportation of passengers and freight.

The Legislature has expressly delegated to railway companies the power of eminent domain. In the exercise of that power they represent the sovereignty of the state, and decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within those limitations their discretion is practically absolute.

It is competent for the courts to supervise the exercise of the power delegated, but they cannot invade the bounds set by the Legislature, and will not undertake to control the discretion of the companies in taking property for their use,

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unless there has been a very clear abuse of power. *St. Louis R. Co. v. Petty* (Ark.) 21 S. W. 884, 20 L. R. A. 434.

In that case the Supreme Court of Arkansas, speaking through Cockrill, C. J., says: "The appellee argues that the proof shows that the railway's proceeding to condemn is prosecuted, not for its own use, but for the use and benefit of the Western Coal & Mining Company, a corporation which owns and operates a coal mine near the appellant's line of railway. The managers of the railway were probably instigated by the coal company to institute the condemnation proceeding, and they doubtless intended that the coal company should derive a benefit therefrom. But those facts alone do not furnish a legal reason sufficient to warrant judicial interference with the power delegated to the corporation by the Legislature. If the land is needed for legitimate railroad purposes, the motive which influenced the railway managers in undertaking the work will not take from it its public character. A proposed public user will not be enjoined by the courts upon the ground that it will further private interests. * * * To the public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user." The language of the learned judge in that case is peculiarly applicable to the facts in the case under consideration, and the doctrine there laid down finds distinct expression in numerous decisions cited in the opinion and in an exhaustive note to the case.

The annotators, in referring to the cases of *Kyle v. Texas & N. O. R. R. Co.* (Tex. App.) 4 L. R. A. 275, and *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va., 710, 8 S. E. 453, 2 L. R. A. 680, relied on by plaintiff in error as sustaining a contrary doctrine, observe:

"These two cases are plainly in direct conflict with the cases cited in the former part of this note.

"Indeed, the court in *Kyle v. Texas & N. O. R. Co.*, supra, expressly adopted the views expressed in a dissenting opinion delivered by Judge Trunkey in *Getz's Appeal*, supra."

The Reports abound with decisions to the effect that a railway built for the purpose of reaching an industrial enterprise is for a public use, and the company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it. *Chicago & N. W. R. Co. v. Morehouse* (Wis.) 56 L. R. A. 240, and cases cited in opinion and notes; 2 Min. Inst. (4th Ed.) 25; 1 Wood, Ry. Law, pp. 648-653.

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As remarked, the question of the necessity, propriety of expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional or statutory provision to the contrary, is a legislative, and not a judicial, question. *Alex., etc., R. Co. v. Alex. & W. R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Roanoke v. Berkowitz*, 80 Va. 616; *Tait's Ex'r v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

In a very recent case this court had occasion to observe that the visitorial powers of a court over a private corporation do not authorize the substitution of its business judgment for that of the corporation. *Roanoke Cemetery Co. v. Goodwin* (Va.) 44 S. E. 769.

It is plain from the authorities that the order complained of is without error, and it is affirmed.

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Myar v. St. Louis Southwestern Ry. Co. (Ark.), 814.

Objection that statute, providing that traffic fixed by railroad commission should be kept posted up for at least five days before it should go into effect, was not complied with could not be made upon appeal.

Myar v. St. Louis Southwestern Ry. Co. (Ark.), 814.

Railroad not liable for injuries to goods from usual delay, where it had no notice of the urgency of the shipment.

Choctaw & M. Ry. Co. v. Walker (Ark.), 784.

Railroad station agent has no authority to contract with a shipper for transportation at a lower rate than that allowed to others.

Myar v. St. Louis Southwestern Ry. Co. (Ark.), 814.

Refusal to furnish cars, immaterial that other shippers were refused.

Loraine v. Pittsburg, J., E. & E. R. Co. (Pa.), 306.

Rev. St. 1889 of Missouri, § 2629, prohibiting discrimination in freight charges is not repealed.

McGrew v. Missouri Pac. Ry. Co. (Mo.), 855.

Right to deliver to consignee without production of evidence of ownership, where no bills of lading were issued.

Schlichting v. Chicago, etc., Ry. Co. (Iowa), 597.

Rules and regulations, authority to make.

Chicago, R. I. & P. Ry. Co. v. Colby (Neb.), 283.

Rules and regulations, reasonableness question for court.

Chicago, R. I. & P. Ry. Co. v. Colby (Neb.), 283.

Rules of a carrier imposing reasonable demurrage charges on consignee for delay in unloading cars are enforceable.

New Orleans & N. E. R. Co.

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v. George & Co. (Miss.), 786.

Servant of consignee had no right to presume as to safe condition of car he was unloading.

Sykes v. St. Louis & S. F. R. Co. (Mo.), 772.

Termination of relation.

Stapleton v. Grand Trunk Ry. Co. (Mich.), 332.

The furnishing of cars to mine owners to be loaded on their spur tracks, while refusing, according to carrier's regulations, to furnish cars for loading on the station track to plaintiff, who had constructed no spur track, did not constitute the giving of undue preference, either under the common law or the statute of Arkansas.

Harp v. Choctaw, O. & G. R. Co. (C. C. A.), 823.

Through shipment, though company had no express contract with person who made it a practice to carry goods from railroad station to their destination.

Southern Ry. in Kentucky v. Commonwealth (Ky.), 837.

Validity of contract to haul car in violation of Illinois statute providing that no freight car shall run in the rear of passenger cars.

Illinois Cent. R. Co. v. Byrne (Ill.), 845.

Validity of regulations for receiving freight as affected by fact that they discriminate, with respect to facilities, against those who do not comply with them.

Harp v. Choctaw, O. & G. R. Co. (C. C. A.), 823.

Where a railroad agreed to haul a car, one of the drawbars of which was broken, by attaching the good end of it to a locomotive or train, it waived any objection that the car was not in proper condition for transportation.

Illinois Cent. R. Co. v. Byrne (Ill.), 845.

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced

CARRIERS OF GOODS—Continued.

against it separately, but enough may be retained to satisfy the charge against all.

New Orleans & N. E. R. Co.
v. George & Co. (Miss.),
786.

CARRIERS OF LIVE STOCK.

See Carriers of Goods.

Assumption of all risks except those from act of God or public enemy.

Herring v. Chesapeake & W.
R. Co. (Va.), 262.

Assumption of risks by shipper riding on free pass to enable him to care for stock.

Chicago, B. & Q. R. Co. v.
Troyer (Neb.), 797.

Breach of common-law duty or special contract, effect of variance.

Lake Erie & W. R. Co. v.
Holland (Ind.), 735.

Burden of proof on carrier to show that injuries did not result from its own negligence, though shipper accompanied stock.

Nelson v. Great Northern Ry.
Co. (Mont.), 311.

Burden of proving assent to contract.

Cleveland, etc., R. Co. v.
Patton (Ill.), 336.

Carrier not liable for nondelivery to person designated by mortgagor, where the cattle were consigned by mortgagee to commission firm in order to protect payment of mortgage debt.

Johnston v. Chicago, B. & Q.
R. Co. (Neb.), 744.

Carrier not liable for shipper's failure to feed and water according to contract.

Lewis v. Pennsylvania R.
Co. (N. J.), 731.

Common carrier not liable to mortgagor for diversion of property delivered to mortgagee upon breach of conditions.

Johnston v. Chicago, B. &
Q. R. Co. (Neb.), 744.

Damages.

Instruction authorizing recovery of expenses for feed-

CARRIERS OF LIVE STOCK—Continued.

ing rendered necessary by condition of sheep at place of delivery was erroneous, as allowing double damages.

Nelson v. Great Northern
Ry. Co. (Mont.), 311.

Measure of damages for injuries to stock in transit.

Cleveland, etc., R. Co. v.
Patton (Ill.), 336.

Defective car, finding not warranted.

Central of Georgia Ry. Co.
v. James (Ga.), 1.

Delay, insufficiency of evidence of negligence where it was necessary to hold cattle on account of sickness and death of one of them.

Lewis v. Pennsylvania R.
Co. (N. J.), 731.

Delay in transportation, sufficiency of evidence.

Johnston v. Chicago, B. &
Q. R. Co. (Neb.), 744.

Delay, liability for.

Nelson v. Great Northern
Ry. Co. (Mont.), 311.

Duty to furnish shipper riding on free pass in order to care for stock safe passageway from car to station.

Chicago, B. & Q. R. Co. v.
Troyer (Neb.), 797.

Effect of shipper's agreement to care for stock while in transit.

Central of Georgia Ry. Co.
v. James (Ga.), 1.

Estoppel of shipper to deny authority of his agent to enter into contract of shipment.

Central of Georgia Ry. Co.
v. James (Ga.), 1.

Evidence.

Of delay not admissible under complaint.

Central of Georgia Ry. Co.
v. James (Ga.), 1.

Waybill was not evidence of contract for through transportation.

Herring v. Chesapeake &
W. R. Co. (Va.), 262.

Injuries from natural propensities of animals, liability.

Lewis v. Pennsylvania R.
Co. (N. J.), 731.

Instruction as to carrier's knowledge of storm when

CARRIERS OF LIVE STOCK*—Continued.*

accepting shipment warranted by evidence.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Limiting Liability.

Agreement as to value.

Central of Georgia Ry. Co. *v.* Glascock & Warfield (Ga.), 292.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Burden on shipper to prove that loss did not result from negligence.

Morse *v.* Canadian Pac. Ry. Co. (Me.), 296.

Carrier cannot free itself of the duty to furnish proper cars.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Consideration essential.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Failure of shipper to send person in charge, according to contract, did not release carrier from liability on account of defects in cars known to carrier but hidden from shipper selecting them.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Freeing itself by contract from its usual common-law duties does not change the character of a carrier's employment and make it a private carrier.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Invalidity of contract, sufficiency of allegations.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Liability limited to that of private carrier for hire in consideration of reduced rate.

Central of Georgia Ry. Co. *v.* Glascock & Warfield (Ga.), 292.

Liability on account of hidden defects, known to carrier, in car selected by shipper under special contract.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

May limit liability for losses

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not resulting from negligence.

Morse *v.* Canadian Pac. Ry. Co. (Me.), 296.

Reduced rate a sufficient consideration.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Reduced rate, bill of lading not conclusive, but facts may be shown by parol evidence.

Lake Erie & W. R. Co. *v.* Holland (Ind.), 735.

Right to limit liability.

Morse *v.* Canadian Pac. Ry. Co. (Me.), 296.

Right to limit liability for delay, statute.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Special contract merely constitutes a defense in so far as exemptions from liability which it creates are valid; and does not prevent shipper from maintaining action for breach of common-law duties.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Whether state court should apply law of place of contract to controversy respecting right of common carrier to limit its liability for negligence to agreed valuation is not a federal question.

Pennsylvania R. Co. *v.* Hughes, etc., (U. S.), 764.

Notice of claim on account of loss.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Not liable where storm proximate cause of injury.

Herring *v.* Chesapeake & W. R. Co. (Va.), 262.

Proximate cause where injury from storm after negligent delay.

Herring *v.* Chesapeake & W. R. Co. (Va.), 262.

Storm no excuse where carrier had knowledge of it before accepting shipment.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Sufficiency of complaint, in action for injury from ex-

CARRIERS OF LIVE STOCK*—Continued.*

posure to storms after negligent delay in shipping.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Sufficiency of complaint in action in tort for breach of common-law duties in shipment of stock.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

Validity of contract providing for care of stock by shipper even during delay.

Lewis *v.* Pennsylvania R. Co. (N. J.), 731.

Violation of contract, complaint must set out contract.

Nelson *v.* Great Northern Ry. Co. (Mont.), 311.

CARRIERS OF PASSENGERS.*See Baggage.**Street Railways.***Baggage.**

Money not carried by passenger for traveling expenses is not.

Levins *v.* New York, N. H. & H. R. Co. (Mass.), 163.

Not liable for theft by servant of money left by passenger momentarily in car window.

Levins *v.* New York, N. H. & H. R. Co. (Mass.), 163.

Care due employee riding to and from work.

Carswell *v.* Macon, D. & S. R. Co. (Ga.), 833.

Care required in discharging passengers.

Shealey *v.* South Carolina & G. Ry. Co. (S. Car.), 680.

Care required of street railway in receiving passengers.

Norfolk & A. Terminal Co. *v.* Morris (Va.), 165.

Carrier entitled to notice in order to make proper arrangements for transportation of lunatic.

Owens *v.* Macon & B. R. Co. (Ga.), 751.

Carrier liable as licensee on account of defective steps of pavilion used by it as a station.

Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.

Cause of passenger's death fairly inferred to be the

CARRIERS OF PASSENGERS*—Continued.*

lurching of the train when he was near an open vestibule door.

Robinson *v.* Chicago & A. R. Co. (Mich.), 726.

Company bound to know effect of time and whether upon its appliances.

Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.

Contributory Negligence.

Burden of proof.

Boone *v.* Oakland Transit Co. (Cal.), 601.

Custodian of lunatic injured by sudden lurch of car, was not guilty of such contributory negligence in riding in baggage car from necessity, in order to be with his charge, as to relieve carrier of any responsibility for his safety.

Chesapeake & O. Ry. Co. *v.* Jordan (Ky.), 672.

Pleading and proof.

Bailey *v.* Seattle & R. Ry. Co. (Wash.), 697.

Position of passenger when car was stopped, in obedience to his signal, with a jar.

Jennings *v.* Union Traction Co. (Pa.), 663.

Standing in caboose of moving freight train, which contained, in a prominent position, a warning to passengers against standing while the train is in motion, waiting for drinking water to be cooled.

Krumm *v.* St. Louis, I. M. & S. Ry. Co. (Ark.), 821.

Standing on platform of moving train.

Augusta Southern R. Co. *v.* Snider (Ga.), 622.

Damages.

Exemplary damages for exclusion of sober man from train.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

Exemplary damages for exclusion of sober man from train, facts entitled, and not entitled to consideration.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

CARRIERS OF PASSENGERS **CARRIERS OF PASSENGERS** —Continued. —Continued.

Future damages must be reasonably certain.
 Chicago & N. W. Ry. Co. *v.* De Clow (C. C. A.), 604.
 Measure of damages, instruction.
 Yazoo & M. V. R. Co. *v.* Smith (Miss.), 579.
 Plaintiff not estopped by statement of counsel as to effect of pleading and proof.
 Steedman *v.* South Carolina & G. E. R. Co. (S. Car.), 627.
 Punitive damages for carrying beyond station, insufficiency of evidence to warrant.
 Yazoo & M. V. R. Co. *v.* Smith (Miss.), 579.
 Punitive damages, pleading.
 Steedman *v.* South Carolina & G. E. R. Co. (S. Car.), 627.
 Degree of care.
 Chesapeake & O. Ry. Co. *v.* Jordan (Ky.), 672.
 Derailment of street car due to excessive speed over defective track.
 Smith *v.* Milwaukee Electric Ry. & Light Co. (Wis.), 657.
 Direction of verdict for defendant properly refused in action for injury to passenger caused by violent jerk of train while he, prepared to alight, was standing near door.
 Field *v.* Delaware, L. & W. R. Co. (N. J.), 653.
 Discharging street railway passengers at dangerous places.
 Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.
 Duty to announce approach to station.
 Southern Ry. Co. *v.* Hobbs (Ga.), 685.
 Duty to inspect appliances.
 Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.
 Duty to protect passengers against strangers.
 Dufur *v.* Boston & M. R. Co. (Vt.), 711.
 Ejection.
 Carrier could not show custom to issue such tickets for

certain days only, in the absence of any proof of knowledge of such limitation by the passenger or purchaser of the ticket.
 Carvey *v.* Detroit & M. R. Co. (Mich.), 638.
 Failure to produce ticket good on its face or to pay fare.
 Brown *v.* Rapid Ry. Co. (Mich.), 802.
 Insufficiency of evidence to show that conductor knew that passenger was the same person who had presented the going part of return ticket.
 Western Maryland R. Co. *v.* Schaun (Md.), 693.
 Recovery could not be had in action *ex delicto* where ejection because of defect in return ticket, owing to conductor's negligence in failing to properly describe personal characteristics.
 Western Maryland R. Co. *v.* Schaun (Md.), 693.
 Right to recover in action of tort where expulsion by carrier resulted from failure of initial carrier's conductor to correctly punch transfer.
 Perrine *v.* North Jersey St. Ry. Co. (N. J.), 678.
 Employee riding to and from work as a passenger.
 Carswell *v.* Macon, D. & S. R. Co. (Ga.), 833.
 Evidence.
 In an action by a passenger for personal injuries, witness can testify from personal knowledge as to a custom of the railroad company to destroy all ticket stubs after sixty days.
 Shealey *v.* South Carolina & G. Ry. Co. (S. Car.), 680.
 Prejudicial error in admitting statements of conductor that plaintiff, injured while attempting to alight, blamed him.
 Boone *v.* Oakland Transit Co. (Cal.), 601.
 Statements of conductor, made after he had walked back some distance to where

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plaintiff lay on the ground, formed no part of res gestæ.

Boone *v.* Oakland Transit Co. (Cal.), 601.

Subsequent intoxication, in action for exclusion from train.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

Exclusion from train on ground of intoxication, instruction that there was no evidence of wantonness, insult, or other aggravation properly refused.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

Fact that vestibule door between pullman cars was open showed negligence on part of railroad company.

Robinson *v.* Chicago & A. R. Co. (Mich.), 726.

Insufficiency of evidence to warrant instruction as to aggravating circumstance in carrying infirm female passenger beyond destination.

Southern Ry. Co. *v.* Hobbs (Ga.), 685.

Liability for injury to passenger shot by person allowed by railroad to maintain rifle range near track.

Dufur *v.* Boston & M. R. Co. (Vt.), 711.

Liability on account of carrying infirm female passenger beyond destination, whom conductor had promised to assist to alight.

Southern Ry. Co. *v.* Hobbs (Ga.), 685.

Liability question for jury where injury to passenger resulted from negligence in approaching switch, and negligence in not taking precautions to prevent switch from being left open by children or others.

Leslie *v.* Jackson & S. Traction Co. (Mich.), 660.

Limiting Liability.

Not contrary to public policy to limit liability for injuries to express messengers.

Peterson *v.* Chicago & N. W. Ry. Co. (Wis.), 286.

Right of railroad to enforce express company's con-

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tract exempting latter from liability for injuries to express messengers.

Peterson *v.* Chicago & N. W. Ry. Co. (Wis.), 286.

Mixed trains, carrier not liable for injuries from jerks or bumping incidental to such trains.

Illinois Cent. R. Co. *v.* Vinson (Ky.), 656.

Mixed trains, degree of care required in operating.

Illinois Cent. R. Co. *v.* Vinson (Ky.), 656.

Negligence in failing to inspect vestibule door between pullman cars.

Robinson *v.* Chicago & A. R. Co. (Mich.), 726.

Passengers boarding or alighting may assume that officials have taken proper precautions to insure their safety.

Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.

Presumption of negligence from injury to passenger.

Leveret *v.* Shreveport Belt Ry. Co. (La.), 611.

Prima facie case of negligence where alighting passenger injured by sudden starting of car.

Denver Consol. Tramway Co. *v.* Rush (Colo.), 617.

Prior misconduct did not justify exclusion from train.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

Railroad can refuse to admit on its trains a person who is drunk, though he has a ticket.

Story *v.* Norfolk & S. R. Co. (N. Car.), 631.

Railroad could not escape liability for failure to provide a safe passage from one car to another by showing contract with sleeping car company to perform the duty.

Robinson *v.* Chicago & A. R. Co. (Mich.), 726.

Railroad sued jointly with sleeping car company could not complain of direction of verdict for latter, in action for death of passenger thrown through open vestibule door by lurching of car.

Robinson *v.* Chicago & A. R. Co. (Mich.), 726.

CARRIERS OF PASSENGERS CHILDREN—Continued.

—Continued.

Removal from office, application of constitutional provision prohibiting the use of free pass by public official.

People v. Wadhams (N. Y.), 635.

Right to refuse to accept lunatic as passenger.

Owens v. Macon & B. R. Co. (Ga.), 751.

Right to rely on and make proof of custom to assist unattended female passengers to alight.

Southern Ry. Co. v. Hobbs (Ga.), 685.

Scope of conductor's promise to assist infirm passenger to alight.

Southern Ry. Co. v. Hobbs (Ga.), 685.

Sufficiency of complaint in action for violation of separate coach law of Kentucky, in assigning white passenger to wrong car.

Southern Ry. Co. in Kentucky v. Thurman (Ky.), 489.

Where the custodian of a lunatic was permitted by the conductor to ride in the baggage car of a mixed train, and was injured by a sudden jerk, whether the jerk was unusual or unnecessary, was for the jury.

Chesapeake & O. Ry. Co. v. Jordan (Ky.), 672.

CARS.

See Carriers of Live Stock.

CHILDREN.

See Damages.

Contributory Negligence.

Care required of boy sixteen years old.

Mitchell v. Illinois Cent. R. Co. (La.), 240.

Child twenty-five months old cannot be chargeable with.

O'Brien v. Wisconsin Cent. Ry. Co. (Wis.), 462.

Not negligence, as matter of law, for child six and one-half years of age to cross street car tracks.

McDermott v. Boston Elevated Ry. Co. (Mass.), 379.

Question for jury where boy was injured while crossing street car tracks.

Campbell v. St. Louis & Suburban Ry. Co. (Mo.), 248.

Negligence of father in allowing child twenty-five months of age to escape to railroad track, while he was splitting wood, was a question for the jury.

O'Brien v. Wisconsin Cent. Ry. Co. (Wis.), 462.

CIRCUMSTANTIAL EVIDENCE.

See Fires.

COLLISIONS.

See Crossings.

COMBUSTIBLES ON RIGHT OF WAY.

See Fires Set by Locomotives.

COMPARATIVE NEGLIGENCE.

See Accidents on Track.

CONCURRENT NEGLIGENCE.

See Accidents on Track.

Contributory Negligence. Fellow Servants.

CONNECTING CARRIERS.

Burden of proving which carrier is responsible for injury to freight.

Beede v. Wisconsin Cent. Ry. Co. (Minn.), 290.

Duty of intermediate carrier to inspect cars.

Sykes v. St. Louis & S. F. R. Co. (Mo.), 772.

Intermediate carrier owes no duty to servant of consignee to inspect cars.

Sykes v. St. Louis & S. F. R. Co. (Mo.), 772.

Limiting Liability.

Contract was for through shipment, and, under statute of Missouri prohibiting initial carrier from limiting its liability to its own line, it was liable for negligence of connecting carrier, notwithstanding stipulation in bill of lading.

Western S. & D. Co. v. Chicago, etc., R. Co. (Mo.), 804.

CONNECTING CARRIERS—CROSSINGS.*Continued.*

Missouri statute purporting to define carrier's right to limit liability to own line not in conflict with provision of federal constitution authorizing congress to regulate interstate commerce.

Western S. & D. Co. v. Chicago, etc., R. Co. (Mo.), 804.

Statute not unconstitutional when construed as merely depriving a carrier of right to limit liability to its own line with respect to through shipment.

Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co. (Mo.), 299.

CONSIGNEES.

See Connecting Carriers.

CONSOLIDATION.

See Street Railways.

CONSTITUTIONAL LAW.

See Crossings.

Express Companies.

Fences.

Statute making penal the stealing of rides on railroad trains.

Pressley v. State (Ga.), 677.

CONTRACTS.

See Master and Servant.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

Stock, Injuries to.

Instruction as to effect of concurrence of negligence and contributory negligence.

Shealey v. South Carolina & G. Ry. Co. (S. Car.), 680.

Will prevent recovery irrespective of the quantum of negligence of the respective parties.

Richmond Traction Co. v. Martin's Adm'x (Va.), 817.

CONVERSION.

See Carriers of Goods.

COUNTRY CROSSINGS.

See Crossings.

See Children.

Frightening Horses.

Application of charter provisions requiring the construction of wagon crossings.

Thompson v. Louisville & N. R. Co. (Ky.), 511.

Application of penal statute requiring trains to come to full stop before crossing intersecting railroads.

State v. Chicago, etc., Ry. Co. (Iowa), 445.

Application of Pennsylvania statute prohibiting the construction of grade crossings, where relocation of existing highway.

In re Mifflinville Bridge (Pa.), 513.

Company was not under any obligation to maintain a crossing put down by a section man, without authority, for the accommodation of an individual.

Thompson v. Louisville & N. R. Co. (Ky.), 511.

Constitutionality of penal statute requiring trains to come to full stop before crossing intersecting railroads.

State v. Chicago, etc., Ry. Co. (Iowa), 445.

Contributory Negligence.

Burden of proof.

Baltimore & O. R. Co. v. Stumpf (Md.), 203.

Motorman's failure to look for approaching car.

Bobb v. Union Traction Co. (Pa.), 383.

Question for jury.

Kuntz v. New York, etc., R. Co. (Pa.), 377.

Seifred v. Pennsylvania R. Co. (Pa.), 452.

Sufficiency of evidence.

Pittsburg, etc., Ry. Co. v. Robson (Ill.), 354.

Distinction between care required of railroad when engaged in hazardous work and when engaged in ordinary operations at crossings.

Mitchell v. Illinois Cent. R. Co. (La.), 240.

Evidence.

Opinion evidence as to dangerous character of crossing was admissible.

Seifred v. Pennsylvania R. Co. (Pa.), 452.

CROSSINGS—Continued.

Ordinance limiting speed rendered irrelevant by theory of case.

Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Failure to warn as proximate cause of "running switch" accident.

Mitchell *v.* Illinois Cent. R. Co. (La.), 240.

Flagman.

Purchaser of railroad did not become vendor's "successor" within contract obligating him and his successors to pay for maintenance of a flagman at a crossing. Chicago, etc., Ry. Co. *v.* Fox River Elec. Ry. & Power Co. (Wis.), 563.

Whether statute or ordinance applicable with respect to railroad's duty to station flagman at certain points.

McGoran *v.* New York, etc., R. Co. (R. I.), 367.

Gates.

Invitation to cross implied from open gates.

Baltimore & O. R. Co. *v.* Stumpf (Md.), 203.

Lookouts, insufficiency of evidence to show negligence with respect to, where view was obstructed.

O'Brien *v.* Wisconsin Cent. Ry. Co. (Wis.), 462.

Presumption of due care on part of deceased.

Blauvelt *v.* Delaware, L. & W. R. Co. (Pa.), 466.

Presumption of negligence created by statute, rebuttal of by evidence of ordinary care of both parties.

Atlanta Ry. & Power Co. *v.* Gaston (Ga.), 50.

"Running switch," gross negligence.

Mitchell *v.* Illinois Cent. R. Co. (La.), 240.

Signals.

Positive and negative testimony.

Frank *v.* Pennsylvania R. Co. (N. J.), 375.

Kuntz *v.* New York, etc., R. Co. (Pa.), 377.

CROSSINGS—Continued.

Stanley *v.* Cedar Rapids, etc., Ry. Co. (Iowa), 398.

Question for jury whether proper signals were given.

Kuntz *v.* New York, etc., R. Co. (Pa.), 377.

Speed.

No limit of speed at which trains may run through open country over country-road crossing.

Custer *v.* Baltimore & O. R. Co. (Pa.), 448.

Question as to reasonableness of speed, even within city limits or populous districts, may be affected by fact that watchman has been stationed at the crossing.

Custer *v.* Baltimore & O. R. Co. (Pa.), 448.

Six miles per hour lawful speed within city at crossing where no gates are maintained, construction of Wisconsin statute.

O'Brien *v.* Wisconsin Cent. Ry. Co. (Wis.), 462.

Trains may be run at a high rate of speed, even within city limits or through populous districts, where a watchman has been stationed at the crossing.

Custer *v.* Baltimore & O. R. Co. (Pa.), 448.

State not compelled to prove beyond a reasonable doubt the violation of the penal statute of Iowa requiring trains to come to a full stop before crossing intersecting railroads.

State *v.* Chicago, etc., Ry. Co. (Iowa), 445.

State's burden of proving violation of penal statute requiring trains to come to full stop before crossing intersecting railroads not shifted by mere proof that the train in question did not stop.

State *v.* Chicago, etc., Ry. Co. (Iowa), 445.

Stop, Look, and Listen.

Care required of driver of vehicle, erroneous instruction.

Baltimore & O. R. Co. *v.* Stumpf (Md.), 203.

CROSSINGS—Continued.

Direction of verdict for defendant.

McGoran *v.* New York, etc., R. Co. (R. I.), 367.

Instruction not covered by instruction as to effect of failure to use ordinary care. Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Plaintiff was not guilty of contributory negligence, where obstructed view and absence of signals.

Baltimore & O. R. Co. *v.* Stumpf (Md.), 203.

Question for jury whether boy should have stopped vehicle in order to look and listen before crossing street car tracks, on a dark night, where evidence conflicting as to whether headlight on car.

Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Recovery precluded by failure to look.

Dwajakowski *v.* Central R. Co. of New Jersey (N. J.), 374.

CUSTOMS.

See Carriers of Passengers.

DAMAGES.

See Carriers of Live Stock. Carriers of Passengers. Master and Servant. Railroads in Streets.

Evidence.

Life tables.

Atlanta Ry. & Power Co. *v.* Maddox (Ga.), 452.

Atlanta Ry. & Power Co. *v.* Monk (Ga.), 426.

DEATH BY WRONGFUL ACT.**Damages.**

Pecuniary loss from death of son in action by mother.

Blauvelt *v.* Delaware, L. & W. R. Co. (Pa.), 466.

Verdict for \$10,000 did not warrant an inference of prejudice.

Frank *v.* Pennsylvania R. Co. (N. J.), 376.

DEGREE OF CARE.

See Street Railways.

DEMURRAGE.

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DISCOVERED PERIL.

See Accidents on Track. Personal Injuries.

DISCRETION.

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DISCRIMINATION.

See Carriers of Goods. Express Companies. Interstate Commerce.

DIVERSION OF SHIPMENT.

See Carriers of Live Stock.

DOGS.

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ELECTRIC RAILWAYS.

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EMINENT DOMAIN.

See Branch Railroads.

Damages.

Competency of witnesses to testify.

Smith *v.* Pennsylvania R. Co. (Pa.), 523.

Railroad's right to exercise discretion as to land to be condemned.

Zircle *v.* Southern Ry. Co. (Va.), 861.

Spur tracks to private industrial enterprise.

Zircle *v.* Southern Ry. Co. (Va.), 861.

The question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional or statutory provisions to the contrary, is legislative and not judicial. Zircle *v.* Southern Ry. Co. (Va.), 861.

EMPLOYEES.

See Carriers of Passengers.

EMPLOYEES OF ANOTHER COMPANY.

See Personal Injuries.

EMPLOYERS' LIABILITY EXPERT TESTIMONY.
ACTS.

All persons divided into three classes, with respect to liability for negligence, by Pennsylvania statute.

Keck v. Philadelphia & R. R. Co. (Pa.), 541.

Application of provision of Mississippi constitution limiting fellow-servant rule.

Gulf & S. I. Ry. Co. v. Bussy (Miss.), 537.

Application of statute.

Williams v. Iowa Cent. Ry. Co. (Iowa), 20.

Application of statute, negligence of person having authority to direct.

Southern Indiana Ry. Co. v. Harrell (Ind.), 35.

Engineer running train on track of another company, under permission given to his employer to use such road, and injured by the negligence of the employees of the other company, is not within Pennsylvania statute providing that any person who sustains injury while engaged in railroad work about any train of a company of which he is not an employee shall have the same right of action as if he were an employee.

Keck v. Philadelphia & R. R. Co. (Pa.), 541.

Fireman in temporary charge of engine not in control of it.

Louisville & N. R. Co. v. Goss (Ala.), 129.

Railroad work, unloading rails is.

Williams v. Iowa Cent. Ry. Co. (Iowa), 20.

Track used by two companies considered the property of each, under Pennsylvania act, April 4, 1868.

Keck v. Philadelphia & R. R. Co. (Pa.), 541.

ESTOPPEL.

See Bills of Lading.
Carriers of Live Stock.
Stock, Injuries to.

EVIDENCE.

See Carriers of Passengers.
Damages.
Ordinances.
Stock, Injuries to.
Warehousemen.

See Accidents on Track.

EXPRESS COMPANIES.

Acts 1879 of Indiana, p. 146, relating to foreign express companies, did not confer vested rights so as to exempt companies complying therewith from all future legislative control.

Adams Express Co. v. State (Ind.), 640.

Allegation that company discriminated against was incorporated, when it was not, may be rejected as surplusage, under Indiana Acts 1901, p. 149, prohibiting discrimination by express companies.

Adams Express Co. v. State (Ind.), 640.

Discrimination, construction of Indiana penal statute.

Adams Express Co. v. State (Ind.), 640.

Discrimination, Indiana penal statute not invalid as an interference with interstate commerce.

Adams Express Co. v. State (Ind.), 640.

Fact that foreign express company is sued by wrong name may be pleaded in abatement.

Adams Express Co. v. State (Ind.), 640.

Name of defendant foreign express company, compliance with Indiana statute.

Adams Express Co. v. State (Ind.), 640.

EXPRESS MESSENGERS.

See Carriers of Passengers.

FAILURE TO CALL WITNESSES.

See Fires Set by Locomotives.

FEDERAL COURTS.

See Fellow Servants.

FEDERAL QUESTIONS.

See Limiting Liability.

FELLOW SERVANTS.

See Employers' Liability Acts.
Master and Servant.

Competent to prove under denial that order was given by superintendent or train dis-

FELLOW SERVANTS—Cont'd. FENCES—Continued.

patcher that it was given by yard master.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

Concurrent negligence of fellow servant and master.

Bodie *v.* Charleston & W. C. Ry. Co. (S. Car.), 95.

Employee riding to work in cart driven by another employee, at latter's invitation, was not his fellow servant.

Louisville Ry. Co. *v.* Anderson (Ky.), 128.

Existence of relation, question for jury.

Metropolitan West Side Elevated Ry. Co. *v.* Fortin (Ill.), 77.

Fireman not fellow servant of boiler inspector.

Marsh *v.* Lehigh Valley R. Co. (Pa.), 545.

Foreman engaged in same work a fellow servant.

Southern Indiana Ry. Co. *v.* Harrell (Ind.), 35.

Looped telltales, not negligence of fellow servant.

McGarrity *v.* New York, N. H. & H. R. Co. (R. I.), 65.

Negligence of both fellow servant and master, liability.

Pennsylvania R. Co. *v.* Jones (C. C. A.), 111.

Negligence of fellow servant, and not failure to furnish air brakes, cause of derailment.

Snyder *v.* Pennsylvania R. Co. (Pa.), 82.

Pleading.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

Rule applied in federal court, in absence of state statute.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

Yard master fellow servant of fireman of switch engine.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

FENCES.

See Master and Servant.

Existence of defect not rebutted by fact of its construction by plaintiff.

Craig *v.* Wabash R. Co. (Iowa), 363.

Fence was a railroad fence within meaning of a statute of Iowa, making railroads liable for killing stock

through failure to fence tracks.

Dailey *v.* Chicago, etc., Ry. Co. (Iowa), 420.

Indiana statute authorizing adjoining owner to fence tracks upon failure of railroad to do so after 30 days' notice, and to recover expenses, including attorneys' fees, from company, is a valid exercise of police power.

Terre Haute & L. Ry. Co. *v.* Salmon (Ind.), 349.

Railroad liable for killing horse, which, after escaping from owner's sufficiently fenced pasture, reached track through gate in fence along adjoining land of third person, and negligently left open by company.

Atkinson *v.* Chicago, etc., Ry. Co. (Wis.), 423.

Stock running at large, application of Iowa statute making railroads liable for killing stock through failure to fence. Dailey *v.* Chicago, etc., Ry. Co. (Iowa), 420.

The provision of Indiana statute, authorizing adjoining land owner to fence right of way at railroad's expense, and providing for recovery of attorney's fees, is in the nature of a penalty, and does not illegally deprive the company of its property without due process of law.

Terre Haute & L. Ry. Co. *v.* Salmon (Ind.), 349.

FIRE APPARATUS.

See Street Railways.

FIRES.

See Warehousemen.

FIRES SET BY LOCOMOTIVES.

Assumption of risk and contributory negligence, pleading.

Alabama Great Southern R. Co. *v.* Clark (Ala.), 589.

Care required as to spark arresters.

Mills *v.* Louisville & N. R. Co. (Ky.), 409.

Damages.

Interest.

Black *v.* Minneapolis & St. L. R. Co. (Iowa), 211.

FIRES SET BY LOCOMOTIVES—Continued.

Measure for destruction of meadow.

Black *v.* Minneapolis & St. L. R. Co. (Iowa), 211.

Measure of damages where grass was destroyed.

St. Louis, etc., Ry. Co. *v.* Hall (Ark.), 438.

Opinion evidence was improperly admitted in action for burning grass.

St. Louis, etc., Ry. Co. *v.* Hall (Ark.), 438.

Degree of care required of railroads to prevent fires.

Alabama Great Southern R. Co. *v.* Clark (Ala.), 589.

Evidence.

Circumstantial evidence as to origin.

Black *v.* Minneapolis & St. L. R. Co. (Iowa), 211.

Cross-examination of engineer, who had testified as to condition of engine, about irrelevant matters.

Marande *v.* Texas & P. Ry. Co. (C. C. A.), 141.

Failure of defendant to call witness, instruction as to effect of.

Marande *v.* Texas & P. Ry. Co. (C. C. A.), 141.

Other fires.

Alabama Great Southern R. Co. *v.* Clark (Ala.), 589.

Mills *v.* Louisville & N. R. Co. (Ky.), 409.

St. Louis, etc., Ry. Co. *v.* Lawrence (I. T.), 414.

Res gestæ, statements of servants employed to guard cotton as to cause of fire, made after termination of their duties, were not.

Marande *v.* Texas & P. Ry. Co. (C. C. A.), 141.

Sparks thrown from other engines.

Black *v.* Minneapolis & St. L. R. Co. (Iowa), 211.

Volume of sparks and distance emitted.

Alabama Great Southern R. Co. *v.* Clark (Ala.), 589.

Logging road liable for results of its negligence in permitting accumulations of combustibles on its right of way, to same extent as a public railroad.

FIRES SET BY LOCOMOTIVES—Continued.

Simpson *v.* Enfield Lumber Co. (N. Car.), 457.

Negligence question for jury where evidence showed existence of combustibles on right of way, and that it was on fire immediately after train passed.

Simpson *v.* Enfield Lumber Co. (N. Car.), 457.

New cause of action not alleged by amendment averring that fire started in combustibles negligently allowed to accumulate on right of way, although original complaint merely alleged negligence with respect to spark arresters.

Simpson *v.* Enfield Lumber Co. (N. Car.), 457.

Presumption of negligence from accident.

St. Louis, etc., Ry. Co. *v.* Lawrence (I. T.), 414.

FLAGMAN.

See Crossings.

FOREIGN CARS.

See Connecting Carriers.

FOREIGN EXPRESS COMPANIES.

See Express Companies.

FOREMAN.

See Fellow Servants.

FREE PASSES.

See Carriers of Live Stock. Carriers of Passengers.

FREIGHT CARS.

See Street Railways.

FRIGHT.

See Negligence.

FRIGHTENING HORSES.

Illinois statute providing regulations for the operation of allowing steam to escape from locomotives near crossings is not unreasonable.

Pittsburg, etc., Ry. Co. *v.* Robson (Ill.), 354.

Instruction as to the right to make customary noises in operating trains near crossing properly refused as invading province of jury.

Pittsburg, etc., Ry. Co. *v.* Robson (Ill.), 354.

FRIGHTENING HORSES— INTERSTATE COMMERCE—
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Question for jury whether escape of steam was in violation of Illinois statute restricting the right to allow steam from locomotives to escape near crossings.

Pittsburg, etc., Ry. Co. v. Robson (Ill.), 354.

Question for jury whether locus in quo a street, so as to render applicable the statute of Illinois restricting the right to allow steam from locomotives to escape near crossings.

Pittsburg, etc., Ry. Co. v. Robson (Ill.), 354.

FUTURE CONSEQUENCES.

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FUTURE DAMAGES.

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GATES.

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Fences.

GRASS.

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GROSS NEGLIGENCE.

See Crossings.

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HAZARDOUS WORK.

See Crossings.

INSPECTION.

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INSTRUCTIONS.

See Crossings.

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Railroads in Streets.

INSULTS.

See Carriers of Passengers.

INSURANCE.

See Relief Associations.

INTEREST.

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INTERSECTIONS.

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INTERSTATE COMMERCE.

See Carriers of Passengers.

"Arrival" into a state within

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meaning of "Wilson Act," providing that all intoxicating liquors transported into any state, upon arrival in such state, shall be subject to the operation of its laws.

Southern Ry. Co. v. Heymann (Ga.), 574.

No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability.

Pennsylvania R. Co. v. Hughes, etc. (U. S.), 764.

Right of state court to refuse to limit liability of common carrier for its negligence in the execution of contract for interstate carriage to agreed valuation, under federal act to regulate commerce of February 4, 1887.

Pennsylvania R. Co. v. Hughes, etc. (U. S.), 764.

Unlawful discrimination in rates between localities not shown where there existed dissimilar conditions.

Interstate Commerce Commission v. Cincinnati, etc., R. Co. (N. Car.), 581.

INTOXICATING LIQUORS.

See Interstate Commerce.

INTOXICATION.

See Carriers of Passengers.

JOINT TORT FEASORS.

See Torts.

JOINT USE OF TRACK.

See Employers' Liability Acts, Master and Servant.

JUDICIAL NOTICE.

Judicial notice will be taken of geographical position of towns on line of railroad.

McGrew v. Missouri Pac. Ry. Co. (Mo.), 855.

JURISDICTION.

See Master and Servant.

LAOHES.

See Railroads in Streets.

LAST CLEAR CHANCE.

See Accidents on Track.

LEGAL CONCLUSIONS.

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Master and Servant.

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LICENSEES.

See Accidents on Track.

Carriers of Passengers.

Allegation that deceased was "lawfully" on defendant's car a mere legal conclusion. State, to Use of Mummaugh v. Western Maryland R. Co. (Md.), 759.

Care due person at station on business with prospective passenger.

Klugherz v. Chicago, M. & St. P. Ry. Co. (Minn.), 339.

Care required of owner of elevator on railroad right of way, who is a licensee, in loading cars so as to avoid interfering with railroad operations.

Chicago, B. & Q. R. Co. v. Giffen (Neb.), 345.

Error in instruction authorizing recovery on proof of facts alleged, where mere negligence was charged, not cured by instruction, given at instance of defendant, requiring proof of wanton or willful injury.

Illinois Cent. R. Co. v. Eicher (Ill.), 226.

Invitation to use tracks within switch limits not implied from fact that they are ballasted to prevent injuries to employees, and persons walking upon them without objection from railroad company are mere licensees.

Illinois Cent. R. Co. v. Eicher (Ill.), 226.

Railroad's negligence a question for jury where employee of owner of elevator was injured by switching operations while loading cars.

Chicago, B. & Q. R. Co. v. Giffen (Neb.), 345.

Sufficiency of complaint, in action for injury, from sudden

LICENSEES—Continued.

starting of car, to shipper on car to deliver calf.

State, to Use of Mummaugh v. Western Maryland R. Co. (Md.), 759.

LIENS.

See Carriers of Goods.

LIFE EXPECTANCY.

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LIFE TABLES.

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LIMITING LIABILITY.

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Carriers of Live Stock.

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Connecting Carriers.

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LOGGING ROADS.

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LOOKOUTS.

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LOSS OF PRESENCE OF MIND.

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LUNATICS.

See Carriers of Passengers.

MANDAMUS.

See Carriers of Goods.

MASTER AND SERVANT.

See Employers' Liability Acts.

Relief Associations.

Allegations in a complaint that a railroad itself negligently ran its train against an employee excluded the theory that the negligent act charged was done by persons for whose acts the company was not responsible.

Chicago, I. & L. Ry. Co. v. Barnes (Ind.), 567.

Appliances, care required in adopting.

Bodie v. Charleston & W. C. Ry. Co. (S. Car.), 95.

Assumption of Risk.

Brakeman injured by lumber piled near switch track.

Bradburn v. Wabash R. Co. (Mich.), 556.

Burden of proof.

Chicago & E. I. R. Co. v. Heerey (Ill.), 26.

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Burden of proving injured employee's knowledge that end of switch was not protected with bumper.

Pennsylvania R. Co. v. Jones (C. C. A.), 111.

Defective hand car, trackman riding on it with knowledge.

Western Ry. of Alabama v. Arnett (Ala.), 132.

Doctrine explained.

Bradburn v. Wabash R. Co. (Mich.), 556.

Doing dangerous work in obedience to orders.

Wrightsville & T. R. Co. v. Lattimore (Ga.), 58.

Failure to protect end of switch with bumper, question for jury, unless evidence of plaintiff's actual knowledge of the fact is clear.

Pennsylvania R. Co. v. Jones (C. C. A.), 111.

Incompetency of fellow servant.

Metropolitan West-Side Elevated Ry. Co. v. Fortin (Ill.), 77.

Looped telltales.

McGarrity v. New York, N. H. & H. R. Co. (R. I.), 65.

Negligence of foreman engaged in same work, if master was not negligent in selecting him for the position.

Southern Indiana Ry. Co. v. Harrell (Ind.), 35.

Negligence of other employees.

Scott v. Seaboard Air-Line Ry. Co. (S. Car.), 148.

Passing trains, where employees are engaged in repairing track.

Sanker v. Pennsylvania R. Co. (Pa.), 54.

Working in dangerous place, instruction.

Chicago & E. I. R. Co. v. Heerey (Ill.), 26.

Working on train running on track of another company.

Keck v. Philadelphia & R. Co. (Pa.), 541.

Attempt of section foreman to perform work with insuffi-

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cient force no defense in action for his injuries.

Bodie v. Charleston & W. C. Ry. Co. (S. Car.), 95.

Care due to railroad watchman on tracks.

Scott v. Seaboard Air-Line Ry. Co. (S. Car.), 148.

Care required in furnishing appliances.

Boyd v. Seaboard Air-Line Ry. Co. (S. Car.), 123.

Care required in maintaining switches.

Boyd v. Seaboard Air-Line Ry. Co. (S. Car.), 123.

Care required in moving engine in yard.

Smith v. Atlanta & C. Air-Line R. Co. (N. Car.), 218.

Concurrent negligence of fellow servant and master, liability.

Bodie v. Charleston & W. C. Ry. Co. (S. Car.), 95.

Contributory Negligence.

And negligence after discovery of plaintiff's peril.

Smith v. Atlanta & C. Air-Line R. Co. (N. Car.), 218.

Burden on plaintiff to show that, notwithstanding his own negligence, defendant could have avoided running engine into him while he was painting switch target.

Smith v. Atlanta & C. Air-Line R. Co. (N. Car.), 218.

Doing dangerous work in obedience to orders.

Wrightsville & T. R. Co. v. Lattimore (Ga.), 58.

Instruction erroneous for ignoring question of due care for his safety by his associates, and due care on his part in giving signal to move train he was unloading.

Williams v. Iowa Cent. Ry. Co. (Iowa), 20.

Insufficiency of evidence.

Gulf & S. I. Ry. Co. v. Bussy et al. (Miss.), 537.

Looped telltales, question for jury.

McGarrity v. New York, N. H. & H. R. Co. (R. I.), 65.

Making running drill.

Wrightsville & T. R. Co. v. Lattimore (Ga.), 58.

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Motorman's failure to look for approaching car at crossing.

Bobb *v.* Union Traction Co. (Pa.), 383.

Nonsuit where both negligence and contributory negligence.

Edwards *v.* Central of Georgia Ry. Co. (Ga.), 120.

Pleading.

Scott *v.* Seaboard Air-Line Ry. Co. (S. Car.), 148.

Question for jury where employee painting switch target was run into by train.

Smith *v.* Atlanta & C. Air-Line R. Co. (N. Car.), 218.

Riding on steps of moving car for sake of view.

Howard *v.* Southern Ry. Co. (N. Car.), 625.

Standing astride of rail when placing crowbar under wheel of car to be unloaded.

Street's Ex'x *v.* Norfolk & W. Ry. Co. (Va.), 43.

Switchman struck by pile of lumber while swinging himself to brakebeam was not guilty of contributory negligence.

Bradburn *v.* Wabash R. Co. (Mich.), 556.

Trackman riding on hand car holding on to defective brace when chargeable with notice of its condition.

Western Ry. of Alabama *v.* Arnett (Ala.), 132.

Trackman riding on hand car holding on to defective brace, when chargeable with notice of its condition, was not necessarily guilty of.

Western Ry. of Alabama *v.* Arnett (Ala.), 132.

Track repairer killed by passing train.

Sanker *v.* Pennsylvania R. Co. (Pa.), 54.

Damages.

Probable length of life of discharged employee may be relevant on question of damages.

Daniels *v.* Boston & M. R. Co. (Mass.), 549.

Punitive damages where injury to servant from wanton or willful acts.

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Boyd *v.* Seaboard Air-Line Ry. Co. (S. Car.), 123.

Wrongful discharge.

Daniels *v.* Boston & M. R. Co. (Mass.), 549.

Degree of care required in maintaining tracks and appliances.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

Degree of care required in operating road.

Pennsylvania Co. *v.* Fishack (C. C. A.), 85.

Duty to observe rules with respect to warnings in moving engines in yards.

Smith *v.* Atlanta & C. Air-Line R. Co. (N. Car.), 218.

Evidence.

Admissibility of evidence to show that the employee in charge of a switch knew that it was defective.

Birmingham Traction Co. *v.* Reville (Ala.), 524.

Competent to show usual method of defendant and other roads of loading cars.

Bodie *v.* Charleston & W. C. Ry. Co. (S. Car.), 95.

Incompetency of motorman, how shown.

Metropolitan West Side Elevated Ry. Co. *v.* Fortin (Ill.), 77.

Legal conclusion, question calling for opinion as to whether person riding in certain position could fall from hand car.

Western Ry. of Alabama *v.* Arnett (Ala.), 132.

Manner in which telltales were looped.

McGarrity *v.* New York, N. H. & H. R. Co. (R. I.), 65.

Other looped telltales.

McGarrity *v.* New York, N. H. & H. R. Co. (R. I.), 65.

Presumption of negligence from injury to servant.

Land *v.* Southern Ry. (S. Car.), 155.

Usual position to occupy on hand car.

Western Ry. of Alabama *v.* Arnett (Ala.), 132.

Whether foreman gave orders as to position employees

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- should occupy on hand car, and how it should be operated.
Western Ry. of Alabama v. Arnett (Ala.), 132.
- Failure of proof in action for injury to brakeman.
Hurt v. Louisville & N. R. Co. (Ky.), 532.
- Failure to protect end of switch with bumper, negligence question for jury.
Pennsylvania R. Co. v. Jones (C. C. A.), 111.
- Jurisdiction of action for injuries from running train over defective track.
Culpepper v. Arkansas Southern R. Co. (La.), 61.
- Lex loci governs rights under contract of employment.
Daniels v. Boston & M. R. Co. (Mass.), 549.
- Liability of company not affected by fence law, where trainman was killed in derailment resulting from presence of cattle at point on track not fenced.
Snyder v. Pennsylvania R. Co. (Pa.), 82.
- Liability of master for wanton or reckless torts of servant not committed within scope of employment.
Southern Ry. Co. v. James (Ga.), 158.
- Looped telltales, sufficiency of evidence of negligence.
McGarrity v. New York, N. H. & H. R. Co. (R. I.), 65.
- Negligence, insufficiency of evidence where employee fell from hand car, when brakes were applied by fellow servant, suddenly, and without authority.
Western Ry. of Alabama v. Arnett (Ala.), 132.
- Negligence of both fellow servant and master, liability.
Pennsylvania R. Co. v. Jones (C. C. A.), 111.
- Negligence question for jury.
Boyd v. Seaboard Air-Line Ry. Co. (S. Car.), 123.
- Negligence question for jury in an action for death of fireman from boiler explosion.
Marsh v. Lehigh Valley R. Co. (Pa.), 545.

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- Nonsuit properly refused, in action for death of employee.
Scott v. Seaboard Air-Line Ry. Co. (S. Car.), 148.
- Nonsuit where no negligence with respect to the train inflicting injury was alleged.
Land v. Southern Ry. (S. Car.), 155.
- Notice of dangers along track was not notice as to piles of material.
Bradburn v. Wabash R. Co. (Mich.), 556.
- Not liable for injury to fireman on switch engine through collision at night with cars on switch track, brought about by erroneous statement by yard master that track was clear.
Pennsylvania Co. v. Fishack (C. C. A.), 85.
- Proximate cause of injury to servant, instruction.
Bodie v. Charleston & W. C. Ry. Co. (S. Car.), 95.
- Question for jury where scintilla of evidence of negligence.
Hurt v. Louisville & N. R. Co. (Ky.), 532.
- Questions for jury whether switch was defective, and whether such defect was the proximate cause of derailment.
Birmingham Traction Co. v. Reville (Ala.), 524.
- Question of speed immaterial, in action for injury to brakeman sustained while he was attempting to set brake on moving car.
Hurt v. Louisville & N. R. Co. (Ky.), 532.
- Release, fraud, sufficiency of allegations.
Western Ry. of Alabama v. Arnett (Ala.), 132.
- Repudiation of contract of employment, sufficiency of evidence.
Daniels v. Boston & M. R. Co. (Mass.), 549.
- Safe place to work, duty of master to furnish.
Southern Indiana Ry. Co. v. Harrell (Ind.), 35.
- Street railway company may be liable on account of defective switch, although it had been approved by the city engineer.
Birmingham Traction Co. v. Reville (Ala.), 524.

MASTER AND SERVANT— NAMES.*Continued.*

Sufficiency of complaint in action for death of brakeman, alleged to have resulted from negligence in backing train at night in switchyard.

Chicago, I. & L. Ry. Co. v. Barnes (Ind.), 567.

Sufficiency of complaint in action for injury to conductor in a derailment resulting from a defective switch.

Birmingham Traction Co. v. Reville (Ala.), 524.

Waiver of right to discharge employee.

Daniels v. Boston & M. R. Co. (Mass.), 549.

Wantonness, question for jury where railroad, without inspection, placed a freight car with defective brake on commercial siding not provided with derailing switch, and it had promised to remedy defects.

Boyd v. Seaboard Air-Line Ry. Co. (S. Car.), 123.

MIXED TRAINS.

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MONEY.

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MORTALITY TABLES.

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MORTGAGES.

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Preferential claims, expenses of trustee in possession after default.

Mersick v. Hartford, etc., Horse R. Co. (Conn.), 496.

Preferential claims, person paying taxes at request of mortgagor railway company was not entitled to prior lien.

Mersick v. Hartford, etc., Horse R. Co. (Conn.), 496.

Supply creditors were not entitled to priority, there having been no diversion of income for benefit of bondholders, though income had been inadequate to meet current expenses.

Mersick v. Hartford, etc., Horse R. Co. (Conn.), 496.

MOTORMEN.

See Crossings.

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NEGLIGENCE.

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Complaint stating cause of action on any theory not demurrable.

Chicago, I. & L. Ry. Co. v. Barnes (Ind.), 567.

Instructions.

Bodie v. Charleston & W. C. Ry. Co. (S. Car.), 95.

Liability where concurrence of remote and proximate cause and absence of contributory negligence.

Mitchell v. Illinois Cent. R. Co. (La.), 240.

Negligence of motorman in becoming spellbound with fear at sight of deceased's peril was a question for the jury.

Barry v. Burlington Ry. & Light Co. (Iowa), 387.

Ordinary care, instruction as to what is.

Hanlon v. Milwaukee Electric Ry. & Light Co. (Wis.), 288.

Recovery may be had under any count of declaration which states a cause of action.

Pittsburg, etc., Ry. Co. v. Robson (Ill.), 354.

Speed in violation of ordinance not of itself gross negligence. Illinois Cent. R. Co. v. Eicher (Ill.), 226.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

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Evidence of existence.

Campbell v. St. Louis & Suburban Ry. Co. (Mo.), 248.

ORDINARY CARE.

See Negligence.

PALACE CARS.

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PARENTS.

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PASSES.

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Carriers of Passengers.

PENAL STATUTES.

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PENALTIES.

See Constitutional Law.
Express Companies.

PERSONAL INJURIES.

All persons divided into three classes by Pennsylvania negligence statute.

Keck v. Philadelphia & R. R. Co. (Pa.), 541.

Contributory Negligence.

Contributory negligence to defeat recovery must be proximate cause of injury.

Richmond Traction Co. v. Martin's Adm'x (Va.), 817.

Damages.**Elements.**

Chesapeake & O. Ry. Co. v. Jordan (Ky.), 672.

Elements specified.

Wilman v. People's Ry. Co. (Del.), 384.

Future pain and suffering and loss of time.

Stanley v. Cedar Rapids, etc., Ry. Co. (Iowa), 398.

Instruction as to effect of pre-existing injury.

Leslie v. Jackson & S. Traction Co. (Mich.), 660.

Verdict of \$4,000 not excessive for permanent injuries of captain of firemen, thirty-seven years of age with salary of \$100 per month.
Hanlon v. Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

Evidence.

Loss of future earning capacity, sufficiency of evidence.
Hanlon v. Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

PERSONAL INJURIES—Continued.

Petition rendered admissible evidence of certain injuries.
Seifred v. Pennsylvania R. Co. (Pa.), 452.

Proof relative to neuritis of the sciatic nerve admissible under the declaration.

Leslie v. Jackson & S. Traction Co. (Mich.), 660.

Liability for injuries to employee of another company.
Keck v. Philadelphia & R. R. Co. (Pa.), 541.

Power of court to compel defendant railroad to furnish bill of particulars giving details relating to accident.

Bogard v. Illinois Cent. R. Co. (Ky.), 64.

Where plaintiff knew, or with ordinary care should have known, of plaintiff's negligence, and could have avoided the accident, but failed to do so, plaintiff can recover.

Richmond Traction Co. v. Martin's Adm'x (Va.), 817.

PLEADING.

See Carriers of Live Stock.
Negligence.

POLICE POWER.

See Fences.

POLICE REGULATIONS.

See Frightening Horses.

PREFERENTIAL CLAIMS.

See Mortgages.

PRESCRIPTION.

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PRESUMPTION OF NEGLIGENCE.

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PRESUMPTIONS.

See Crossings.
Master and Servant.
Stock, Injuries to.
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PRIOR MISCONDUCT.

See Carriers of Passengers.

PRIVATE ENTERPRISES.

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PRIVATE RAILROADS.

See Fires Set by Locomotives.

PROXIMATE CAUSE.

*See Carriers of Live Stock.
Crossings.
Master and Servant.*

PUBLIC ENEMY.

See Carriers of Live Stock.

PUBLIC OFFICERS.

See Carriers of Passengers.

PUBLIC POLIOY.

See Relief Associations.

PULLMAN CARS.

See Carriers of Passengers.

PUNITIVE DAMAGES.

*See Carriers of Passengers.
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RAILROAD COMMISSIONS.

Power to order location of station and construction of depot.
Nashville, C. & St. L. Ry. Co.
v. State (Ala.), 186.

Powers, statutes.

Nashville, C. & St. L. Ry. Co.
v. State (Ala.), 186.

RAILROADS.

*See Branch Railroads.
Relief Associations.*

RAILROADS IN STREETS.

Abutter was entitled to enjoin construction of siding in violation of ordinance in such manner as to injure his property.

Zook *v. Pennsylvania R. Co.*
(Pa.), 480.

Abutter was not guilty of laches in waiting to enjoin use of second track in street until he had ascertained that it was intended to be permanent.

Rock Island & P. Ry. Co. *v.*
Johnson (Ill.), 492.

Additional servitude, laying second track of steam railroad, where abutter owns fee in street.

Rock Island & P. Ry. Co. *v.*
Johnson (Ill.), 492.

Damages.

Loss of customers, proof of general improvement in business not admissible in rebuttal.

Boyer & Lucas *v. St. Louis, S. F. & T. Ry. Co. (Tex.), 486.*

**RAILROADS IN STREETS—
Continued.**

Measure of damages to abutter's property.

Boyer & Lucas *v. St. Louis, etc., Ry. Co. (Tex.), 486.*

Remedy of abutter where second track of steam railroad, constituting an additional servitude, was laid in street.

Rock Island & P. Ry. Co. *v.*
Johnson (Ill.), 492.

RAILROAD WORK.

See Employers' Liability Acts.

RATES.

See Carriers of Goods.

RECEIVERS.

Jurisdiction retained to enforce liability of receivers after termination of receivership.

Ohio Coal Co. *v. Whitcomb*
(C. C. A.), 274.

RECKLESSNESS.

See Master and Servant.

REGULATIONS.

See Carriers of Goods.

RELEASE OF CLAIM.

See Master and Servant.

RELIEF ASSOCIATIONS.

Not against public policy to establish for benefit of employees.

State ex rel. Sheets, Atty. Gen., *v. Pittsburgh, C., C. & St. L. Ry. Co. (Ohio), 168.*

Not ultra vires in railroad to establish.

State ex rel. Sheets, Atty. Gen., *v. Pittsburgh, C., C. & St. L. Ry. Co. (Ohio), 168.*

Railroad not engaged in insurance business in maintaining.

State ex rel. Sheets, Atty. Gen., *v. Pittsburgh, C., C. & St. L. Ry. Co. (Ohio), 168.*

REMARKS OF COUNSEL.

See Trial.

RES GESTÆ.

*See Carriers of Goods.
Carriers of Passengers.
Warehousemen.*

RES IPSA LOQUITUR.

See Street Railways.

REVIEW.

See Carriers of Goods.

RIGHT OF WAY.

Could not be acquired from railroad by adverse possession of land granted by act of congress.

Northern Pacific Railway Company, Plff. in Err., *v.* Abner Townsend (U. S.), 181.

RULES.

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Master and Servant.

"RUNNING SWITCH."

See Crossings.

SAFE PLACE TO WORK.

See Master and Servant.

SCINTILLA OF EVIDENCE.

See Master and Servant.

SCOPE OF EMPLOYMENT.

See Master and Servant.

SEIZURE BY PUBLIC AUTHORITIES.

See Carriers of Goods.

SEPARATE COACHES.

See Carriers of Passengers.

SERVANTS.

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SHIPPER.

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Licensees.

SIDE TRACKS.

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SIGNALS.

See Crossings.

SPARK ARRESTERS.

See Fires Set by Locomotives.

SPEED.

See Accidents on Track.
Street Railways.

SPUR TRACKS.

See Branch Railroads.
Eminent Domain.

STATIONS AND DEPOTS.

See Railroad Commissions.

STEALING RIDES.

See Constitutional Law.

Sufficiency of evidence of violation of penal statute of Georgia.

Pressley v. State (Ga.), 677.

STEAM.

See Frightening Horses.

STOCK, INJURIES TO.

See Animals.

Fences.

Contributory Negligence.

Failure of owner of the horse, a week prior to the accident, to close track gate, could not affect his right to recover.

Atkinson v. Chicago, etc., Ry. Co. (Wis.), 423.

Unlawfully at large where track not required to be fenced.

Wright v. Minneapolis, etc., Ry. Co. (N. Dak.), 471.

Damages.

Not estopped to claim double damages by concession of counsel.

Black v. Minneapolis & St. L. R. Co. (Iowa), 211.

Sufficiency of evidence of value.

Black v. Minneapolis & St. L. R. Co. (Iowa), 211.

Evidence.

Conclusions of witnesses as to gait of horse.

Craig v. Wabash R. Co. (Iowa), 363.

Defendant entitled to peremptory instruction on undisputed testimony of engineer and fireman.

Alabama & V. Ry. Co. v. Stacy (Miss.), 555.

Locus in quo.

Craig v. Wabash R. Co. (Iowa), 363.

Findings as to locus in quo.

Craig v. Wabash R. Co. (Iowa), 363.

Negligence in operation of train immaterial where accident occurred where company should have fenced.

Craig v. Wabash R. Co. (Iowa), 363.

Negligence of section foreman in failing to shut track gate, depending upon persons work-

STOCK, INJURIES TO—Cont'd.

ing in adjoining field to do so, was for the jury.

Atkinson *v.* Chicago, etc., Ry. Co. (Wis.), 423.

Notice of claim not defective in using term "railway" for railroad.

Black *v.* Minneapolis & St. L. R. Co. (Iowa), 211.

Presumption of negligence from accident.

Wright *v.* Minneapolis, etc., Ry. Co. (N. Dak.), 471.

Presumption of negligence from accident, effect of.

Wright *v.* Minneapolis, etc., Ry. Co. (N. Dak.), 471.

Rebuttal of presumption of negligence from accident, insufficiency of evidence.

Dailey *v.* Chicago, etc., Ry. Co. (Iowa), 420.

Sufficiency of evidence that locus in quo was where company should have fenced.

Craig *v.* Wabash R. Co. (Iowa), 363.

STOP, LOOK, AND LISTEN.

See Crossings.

Street Railways.

STORMS.

See Carriers of Live Stock.

STREET RAILWAYS.

See Accidents on Track.

Carriers of Passengers.

Crossings.

Burning out of electric fuse not prima facie evidence of negligence, in action for injury to passenger.

Cassady *v.* Old Colony St. Ry. Co. (Mass.), 666.

Care required of street railway and person crossing street not at crossing.

Wilman *v.* People's Ry. Co. (Del.), 384.

Care required to avoid collisions with other users of streets.

Wilman *v.* People's Ry. Co. (Del.), 384.

Company acquiring all the rights and obligations of another company, which had constructed a line in an adjoining city on the same condition with respect to giving transfers as its own line had been laid, was not required to grant trans-

STREET RAILWAYS—Cont'd.

fers from the lines in one city to those in the other.

City of Montpelier *v.* Barre & M. T. & P. Co. (Vt.), 840.

Contributory Negligence.

Alighting from moving car.

Richmond Traction Co. *v.* Williams (Va.), 754.

Attempt of driver of hose cart to cross tracks ahead of car.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

Care required of persons using street car tracks.

Wilman *v.* People's Ry. Co. (Del.), 384.

Custom entitled driver of fire hose cart to assume that speed of street car would be slackened to allow him to cross tracks.

Hanlon *v.* Milwaukee Electric Ry. & Light Co. (Wis.), 388.

Negligence shown by the evidence, in action for injuries sustained by driver of vehicle while crossing tracks.

Stanley *v.* Cedar Rapids, etc., Ry. Co. (Iowa), 398.

Speed of cars, judgment required of person about to drive over street car tracks.

Hanlon *v.* Milwaukee Electric Ry. & Light Co. (Wis.), 388.

Degree of care due alighting passengers.

Richmond Traction Co. *v.* Williams (Va.), 754.

Duty of street railway company to afford its passengers reasonable opportunity to alight is no greater than that of the ordinary steam railroad company.

Boone *v.* Oakland Transit Co. (Cal.), 601.

Duty to comply with ordinances.

Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Evidence.

Cross-examination of witness testifying as to speed of car.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

How far gongs of fire patrol wagons could be heard.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

STREET RAILWAYS—Cont'd.

Incompetency of motorman, how shown.

Metropolitan West Side Elevated Ry. Co. *v.* Fortin (Ill.), 77.

Opinion as to speed of car based on noise made by it.

Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Rule of company for operation of cars, in action for negligence in operating car.

Frizzell *v.* Omaha St. Ry. Co. (C. C. A.), 714.

In action for injuries to a passenger on an electric car by the burning out of a fuse, plaintiff's unsuccessful attempt to prove by direct evidence the precise cause of the burning out of the fuse did not estop her from relying on the doctrine of *res ipsa loquitur*.

Cassady *v.* Old Colony St. Ry. Co. (Mass.), 666.

Instruction that doctrine of *res ipsa loquitur* did not apply was properly refused in action for injury to passenger from burning out of electric fuse, since how far negligence could be inferred from the accident was for the jury.

Cassady *v.* Old Colony St. Ry. Co. (Mass.), 666.

Mutual obligations and duties of street car companies and other users of streets.

Wilman *v.* People's Ry. Co. (Del.), 384.

Negligence of motorman causing collision with horse cart at crossing established by the evidence.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

Negligence of motorman in becoming spellbound with fear on seeing deceased's danger was a question for the jury.

Barry *v.* Burlington Ry. & Light Co. (Iowa), 387.

Ordinance limiting speed, validity.

Campbell *v.* St. Louis & Suburban Ry. Co. (Mo.), 248.

Regulation requiring extra fare for failure to procure ticket unreasonable.

Kennedy *v.* Birmingham Ry., L. & P. Co. (Ala.), 700.

STREET RAILWAYS—Cont'd.

Right of driver of another vehicle to assume that speed of street car would be stopped or slackened, in accordance with custom, to permit him to cross tracks.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

Speed, sufficiency of instruction that unreasonable rate of speed must have been proximate cause.

Stanley *v.* Cedar Rapids, etc., Ry. Co. (Iowa), 398.

Speed, what rate is negligence depends upon circumstances, in the absence of municipal regulations.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 288.

St. 1895 of Mass., p. 109, c. 121, providing for location of street railway tracks, is not unconstitutional as authorizing the imposition of an additional servitude without compensation.

Eustis *v.* Milton St. Ry. Co. (Mass.), 508.

Hollingsworth *v.* Milton St. Ry. Co. (Mass.), 508.

Kennedy *v.* Milton St. Ry. Co. (Mass.), 508.

Whitney *v.* Milton St. Ry. Co. (Mass.), 508.

Stop, Look, and Listen.

Care required of driver of vehicle.

Hanlon *v.* Milwaukee Electric Ry. & Light Co. (Wis.), 388.

Effect of failure to look for cars.

Wilman *v.* People's Ry. Co. (Del.), 384.

Erroneous instruction as to care required.

Hanlon *v.* Milwaukee Elec. Ry. & Light Co. (Wis.), 388.

Not negligence, as matter of law, to fail to look and listen for cars before attempting to drive across tracks.

Memphis St. Ry. Co. *v.* Riddick (Tenn.), 407.

Only ordinary care required of driver of vehicle.

Stanley *v.* Cedar Rapids, etc., Ry. Co. (Iowa), 398.

STREET RAILWAYS—Cont'd.

Steam railroad crossing rule inapplicable to street railway crossings.

Hanlon v. Milwaukee Electric Ry. & Light Co. (Wis.), 388.

The unlawful operation of freight cars on a street railway constituted a nuisance, entitling a pedestrian injured thereby to recover without regard to the care exercised by those in charge of the cars.

Daly v. Milwaukee Elec. Ry. & Light Co. (Wis.), 520.

Verdict finding that burning out of electric fuse resulted from company's negligence was not contrary to evidence.

Cassady v. Old Colony St. Ry. Co. (Mass.), 666.

STUBS.

See Carriers of Passengers.

SUBSEQUENT INTOXICATION.

See Carriers of Passengers.

SUCCESSORS.

See Crossings.

TELLTALES.

See Master and Servant.

THEATRICAL COMPANIES.

See Carriers of Goods.

THEFT.

See Carriers of Passengers.

THROUGH RATES.

See Carriers of Goods.

TICKETS AND FARES.

See Carriers of Passengers.
Street Railways.

Extra fare could not be charged on account of failure to procure ticket.

Fulmer v. Southern Ry. Co. (S. Car.), 704.

TORTS.

See Master and Servant.

Effect of release of one joint tortfeasor.

Dufur v. Boston & M. R. Co. (Vt.), 711.

TRADE NAMES.

See Express Companies.

TRESPASSERS.

See Accidents on Track.

TRIAL.

Remark of counsel that witnesses for adverse party were "cattle" did not constitute prejudicial error.

Leslie v. Jackson & S. Traction Co. (Mich.), 660.

ULTRA VIRES.

See Relief Associations.

USAGE AND CUSTOM.

See Carriers of Passengers.

VARIANCE.

See Bills of Lading.

Carriers of Live Stock.

VESTED RIGHTS.

See Express Companies.

VESTIBULE DOORS.

See Carriers of Passengers.

WAIVER.

See Master and Servant.

WANTONNESS.

See Accidents on Track.

Carriers of Passengers.

Master and Servant.

WAREHOUSEMEN.

Evidence.

Declarations of defendants' agent, made a few days after fire, were not admissible.

Lyman v. Southern Ry. Co. (N. Car.), 271.

No presumption of negligence from loss of goods by fire.

Lyman v. Southern Ry. Co. (N. Car.), 271.

Res gestæ, hearsay evidence of witness, who arrived after the fire, was not.

Lyman v. Southern Ry. Co. (N. Car.), 271.

Insufficiency of evidence of negligence where loss of goods by fire.

Lyman v. Southern Ry. Co. (N. Car.), 271.

Warehouse receipts as evidence of ownership.

Alabama Great Southern R. Co. v. Clark (Ala.), 589.

WAREHOUSE RECEIPTS.

See Warehousemen.

WARNINGS.

See Carriers of Passengers.

WATCHMAN.

See Crossings.

WAY BILLS.

See Carriers of Live Stock.

WHIPPING STRAPS.

See Master and Servant.

WILLFULNESS.

See Accidents on Track.

WILSON ACT.

See Interstate Commerce.

WITNESSES.

See Eminent Domain.

Evidence.

Fires Set by Locomotives.

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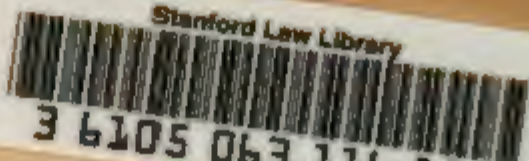
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